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No. 60

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL POWER COMMISSION, PETITIONER

v.

SUNRAY DX OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

SUNRAY DX OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case, entered on December 9, 1966.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. A, *infra*, pp. 15–48) are reported at 370 F. 2d 181. Its earlier opinions in this case (App. B, *infra*, pp. 49–63), denying motions to dismiss the petitions for review on jurisdictional grounds, are reported *sub nom. Amerada Petroleum Corp.* v. *Federal Power Commission* at 338 F. 2d 808, and *sub nom. Sunray DX Oil Co.* v. *Federal Power Commission* at 351 F. 2d 395. The opinion and order of the Federal Power Commission (J.A. 354–396) [1] are reported at 31 F.P.C. 623, and

[1] "J.A." references are to the joint appendix in the court of appeals.

its opinion on rehearing (J.A. 409–418) at 31 F.P.C. 1315. The Commission's later opinions and orders, providing for refunds (App. C, *infra*, pp. 65–82), are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, p. 83) was entered on December 9, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied ac-

cordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * * .

Section 7(e), 15 U.S.C. 717f(e):

> * * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission, on the basis of the applicants' allegations of emergency and without notice or hearing, issued temporary certificates of public convenience and necessity permitting producers of natural gas to sell gas at specified prices pending hearing and determination by the Commission of their applications for permanent certificates. Subsequently, in

the proceedings on the latter applications, the Commission determined the maximum initial price at which the gas could be sold consistently with the public convenience and necessity. This price was lower than those the producers had been charging under the temporary certificates. The question presented is whether the Commission is without power to require the producers to refund any of the excess collected during the interim period.

STATEMENT

This case involves more than 30 contracts for the sale of natural gas from fields in Texas, executed by a number of producers[2] in 1960 and 1961 (see J.A. 361). In each instance, the producer sought and obtained from the Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act (pp. 2–3, *supra*), a temporary certificate of public convenience and necessity that permitted it to make deliveries under the contract while the proceeding on its application for a permanent certificate was pending before the Commission. These certificates were issued on the basis of a claimed emergency condition and without notice or hearing concerning the terms under which the deliveries were to be made. Each certificate recited that the Commission was accepting the rate schedule submitted by the applicant for temporary service only, and that such acceptance did not constitute approval of any rate or charge (*e.g.*, J.A. 189–

[2] Sunray DX Oil Company, Sohio Petroleum Company, Texaco Inc., Gulf Oil Corporation, Sun Oil Company, Edwin L. Cox, Lamar Hunt, Humble Oil & Refining Company, Union Producing Company, respondents here, and 17 others.

190). The Commission, however, had previously announced for the area in question, a provisional guideline price of 18 cents per Mcf (see J.A. 376–377). All of the prices specified in the respective rate schedules were at or below that level, save one, which was slightly below 20 cents[3] (J.A. 361; App. A, *infra*, p. 18).

After extended proceedings the Commission, on March 23, 1964, issued its final decision on the applications for permanent certificates, granting them on condition that the producers charge no more than 16 cents per Mcf (*Amerada Petroleum Corp.*, 31 F.P.C. 623, J.A. 354–396).[4] This was below most of the prices in the temporary certificates and the Commission reserved for future determination the question whether, as a further condition to the granting of the permanent certificates, the producers should be required to refund the charges collected under the temporary certificates, insofar as those charges exceeded

[3] In that instance the producer (Standard Oil Company of Texas) was issued a temporary certificate at the 18 cents guideline price (see J.A. 373). Its petition to review the Commission's grant of a permanent certificate at 16 cents (see text, this page) was dismissed on its motion by the court below.

[4] In *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (the "Catco" case), this Court had held that the Commission could not certificate a sale of natural gas if the price proposed by the seller was out of line with prevailing prices, or so high that it might trigger a general price rise. The Commission is accordingly required to specify a ceiling price in the certificate (the "in line" price). It may, of course, be higher than the just and reasonable price that the Commission might determine in a proceeding under Section 5 of the Natural Gas Act, 15 U.S.C. 717d, its purpose being merely to hold the price level pending completion of Section 5 proceedings, which have proved to be exceedingly protracted in producer cases. See 360 U.S. at 391.

the amounts which would have been collected at the 16 cents "in line" rate.

The producers filed petitions for review (consolidated in the Tenth Circuit) challenging, *inter alia*, the Commission's power to order such refunds. The Commission urged the court to dismiss the challenge as premature. The court declined (*Amerada Petroleum* v. *Federal Power Commission*, 338 F. 2d 808; *Sunray DX Oil Co.* v. *Federal Power Commission*, 351 F. 2d 395; App. B, *infra*, pp. 49–63). While the case was awaiting decision, the Commission issued its decision on the reserved question, ordering the producers to refund (with some offsets) the excessive amounts they had collected while operating under the temporary certificates (App. C, *infra*, pp. 65–82).[5] The court shortly afterwards rendered its final decision. It upheld the grant of the permanent certificates with the 16 cents in-line price condition, but ruled that the Commission had no power to order any refunds where, as here, the temporary certificates had not expressly warned the producers that they might be ordered to make refunds should the in-line price prove to be lower than the prices charged during the period of temporary authorization (App. A, *infra*, pp. 31–39).

REASONS FOR GRANTING THE WRIT

Sales of natural gas in interstate commerce for resale may not be made without a certificate of public

[5] After the Commission acted on petitions for rehearing on December 6, 1966 (App. C, *infra*, pp. 76–82), the producers sought judicial review. The first petition for review was filed in the Tenth Circuit (*Sunray DX Oil Co.* v. *Federal Power Commission*, No. 9227), and the others are in process of being transferred to that circuit.

convenience and necessity issued by the Federal Power Commission after hearing. Natural Gas Act, § 7(c), p. 2, *supra*. Nor may the Commission grant such a certificate if the initial price at which the gas is to be sold is out-of-line. *Atlantic Refining Co.* v. *Public Service Commission of New York ("Catco")*, 360 U.S. 378. In cases of emergency, however, the Commission is empowered to grant, without any notice or hearing, temporary certificates authorizing sales during the period—which may be protracted—while the Commission conducts hearings on the application for a permanent certificate and determines the in-line price at which the gas may be sold consistently with the public convenience and necessity. Not uncommonly, the in-line price as determined after a full adversary hearing is appreciably lower than the price allowed in the temporary certificate on the basis of the producer's *ex parte* representations.

The court of appeals held in this case that the Commission may not, as a condition of granting the permanent certificate, order the producer to refund charges collected under the temporary certificate which are excessive as measured by the in-line price. This ruling presents a question of substantial importance in the administration of the Natural Gas Act, and one on which the circuits are divided. In addition, the ruling is erroneous under principles established in recent decisions of this Court.[6]

[6] There is no obstacle to the Court's reviewing this ruling. It is true that, in terms, the court below held only that the Commission had exceeded its power in reserving for future decision the question of the producers' refund liability. How-

1. The consolidated cases at bar alone would result in approximately $1.2 million in refunds, were the Commission's position sustained. Seven similar proceedings, involving claimed refunds of some $10.3 million, are pending before the Commission or the courts. But these are only the opening rounds in a series of litigations. It is estimated that there are 579 other contracts for the sale of natural gas in regard to which the identical issue may arise. The potential refund liability under these contracts cannot be estimated because the in-line prices have yet to be determined, but it is undoubtedly large.

Perhaps, for the future, the ruling below can be avoided by the inclusion in each new temporary certificate of an express condition obligating the producer to refund any charges found to be excessive

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ever, the court's holding was solely, and expressly, predicated on its view that the Commission had no power to order any refund in a case like this. If, as we think, this ruling was erroneous, *a fortiori* the court erred in ruling that the Commission could not reserve jurisdiction to determine the question.

It is also true that, as noted earlier, the Commission urged the court below to dismiss the producers' challenge to the Commission's refund power as premature. The court rejected this contention because of what it deemed convincing indications that the Commission would, in fact, order refunds (App. A, *infra*, p. 32; App. B, *infra*, pp. 59–60). The court's prediction was correct. Shortly before the court's final ruling, in which it reiterated its rejection of the Commission's challenge to its jurisdiction, the Commission issued its decision on the reserved question, ordering the refunds to be made (App. C, *infra*, pp. 65–82). In the circumstances, we accept the court's ruling that the probability of a refund order was sufficiently great to permit a challenge to the Commission's refund power in advance of the actual refund order. See Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

(but see the Tenth Circuit's earlier decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 270 F. 2d 404). However, this would, of course, have no effect upon the hundreds of outstanding certificates which, as noted above, contain no such provision. The importance to producers and consumers alike of resolving the large potential refund liability that these sales involve is manifest.

2. The issue cannot be resolved without the intervention of this Court, since there is a division among the circuits. The Court of Appeals for the District of Columbia Circuit, in *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963 (the "Skelly" case), has held that in appropriate circumstances—where the balance of the equities warrants—the Commission may require the producer to refund the excess over the in-line price, even though the temporary certificate did not contain an express reminder of a potential refund obligation.

The court below attempted to distinguish *Skelly* on the ground that here the producers, in setting their temporary prices, relied on a guideline price established (albeit provisionally) by the Commission, whereas in *Skelly* there was no guideline price. The distinction will not withstand scrutiny. Assuming that reliance by the producer on a provisional guideline price is relevant in weighing the equities and in determining whether a refund should be ordered in the circumstances of a particular case (see pp. 12–13,

infra),[7] we submit that the court below did not—indeed, could not—review the Commission's appraisal of the equities in this case. In the order under review, the Commission had not ruled finally on whether refunds should be ordered; it had reserved the question (see pp. 7–8, n. 6, *supra*). Thus, the court's decision was necessarily dispositive of the broad issue of the Commission's power to order refunds in *any* case where the temporary certificate does not specify a refund obligation. Its holding that the Commission lacks this power cannot be reconciled with the ruling of the District of Columbia Circuit.

3. Finally, we urge that the ruling below is erroneous. Section 7(e) of the Natural Gas Act (p. 3, *supra*) authorizes the Commission to attach "reasonable terms and conditions" to certificates of public convenience and necessity issued under Section 7(c). The conditioning power is thus in terms a sweeping one. And this Court has construed it broadly in order to advance the fundamental objective of the Act—protection of the consumer against excessive gas prices pending the determination of just and reasonable rates. *Atlantic Refining Co.* v. *Public Service Commission of New York* (*"Catco"*), 360 U.S. 378, 388. Surely, it is not unreasonable for the Commission, in granting an application for a permanent certificate at a price found consistent with the public

[7] We point out that the court of appeals itself acknowledged that the guideline prices of the 1960 Policy Statement were not intended to fix legal rights (App. A, *infra*, p. 22). The Commission, in issuing the Statement, also stressed its preliminary and non-binding character (24 F.P.C. 818, 819; cf. *id.* at 1014).

convenience and necessity, to require the refund of excessive amounts previously collected during the pendency of that application—at least, where it appears additionally that the authority to initiate service prior to permanent certification was stimulated by the producer's anxiety to commence deliveries to the pipeline and was accorded on his *ex parte* request without any notice to those most directly affected: the ultimate consumers of the gas.

Only recently, in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, this Court held that the Commission could compel the refund of charges collected under an in-line price which, on judicial review, was invalidated as unduly high. The Court stressed that until judicial review was completed the price was only provisional. That is equally the case here. The producers obtained authorization to charge the prices in issue on the basis of their *ex parte* representations. The authorization was strictly an interim measure. Each temporary certificate recited expressly that it did not constitute approval of any rate or charge. We submit that here, no less than in *Callery*, the Commission, when it determined that the provisional price had been unduly high, had the power and the duty to "undo what [was] wrongfully done by virtue of its order." 382 U.S. at 229.

It is not decisive, in our view, that the temporary certificate failed to give a more explicit warning to the producer that he might be required, as a condition of obtaining a permanent certificate, to refund charges

found to be excessive.[8] There was no such explicit warning in *Callery*. Nor, we stress, did the consumer interests have warning when the temporary certificates were issued *ex parte* at the producers' behest.

We acknowledge that the Commission should consider elements of justified producer reliance before ordering a refund. In the case of these very sales the producers pointed out to the Commission that they had paid certain royalties and State taxes computed on the basis of the temporary-certificate price which they could not now recoup and the Commission (in orders issued subsequently to the order under review here) decided to allow a deduction from the refund in order to reflect this factor (see App. C, *infra*, pp. 70–71). But it is one thing to say that in determining the measure of refund in a particular case equitable circumstances favoring the producer are entitled to weight; it is quite another to say that, however the equities on both

[8] In eight of the sales that were involved in the review proceeding in the court below, the temporary certificates had specified a refund obligation (see App. A, *infra*, p. 31, n. 33). Six of these, however, had been issued after the Commission's decision in *Skelly Oil Co.*, 28 F.P.C. 401, modified, 28 F.P.C. 1065 (this was the decision set aside by the District of Columbia Circuit in the *Skelly* case, *supra*). In *Skelly*, the Commission held, as a matter of policy, that it would not compel refunds where there was no express refund obligation in the temporary certificate. Thereafter, it specified such obligations in all instances (as here) where it had doubts that the guideline price would be the in-line price. Prior to *Skelly* the Commission's policy on the question of compelling refunds in the absence of a condition to that effect in the temporary certificate had not crystallized. Its practice had been not to include such conditions, except where it felt there were extraordinary circumstances (as in the other two temporary certificates here in which refund conditions were included).

sides balance out, the Commission is foreclosed from ever requiring any refund unless it has unequivocally forewarned the producer. Neither the language nor the purposes of the statute support so inflexible a limitation upon the discretion of the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1967.

APPENDIX A

United States Court of Appeals, Tenth Circuit
NOVEMBER TERM, 1966

Nos. 7781, 8298, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 8358, 8359, 8360 and 8362

SUNRAY DX OIL COMPANY; SOHIO PETROLEUM COMPANY; THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY; THE BROOKLYN UNION GAS COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; LONG ISLAND LIGHTING COMPANY; TEXACO INC.; GULF OIL CORPORATION; SUN OIL COMPANY; EDWIN L. COX; LAMAR HUNT; HUMBLE OIL & REFINING COMPANY; AND UNION PRODUCING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

GULF OIL CORPORATION; HUMBLE OIL & REFINING COMPANY; TEXACO INC.; AND SUN OIL COMPANY, INTERVENORS IN NOS. 8311, 8312, 8313, AND 8314

On Petition To Review Orders of the Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge*: These petitions seek review of Opinion No. 422[1] of the Federal Power Commission granting permanent certificates of public convenience and necessity under § 7 of the Natural

[1] 31 FPC 623.

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Gas Act[2] for sales of natural gas produced in Texas Railroad District No. 4 to various interstate pipeline companies. Nine of the petitions are by independent natural gas producers, three are by distributing companies selling gas in the Atlantic Seaboard area, and one is by the Public Service Commission of the State of New York. All the petitions are brought under § 19(b) of the Act.

The Commission fixed the rate at 16 cents per Mcf. The producers say that the rate is too low and and the distributors say that it is too high. The parties are also at odds on the Commission treatment of the refund question. We affirm the 16-cent rate and hold that refunds of collections made in excess of that rate under temporary certificates containing no express refund condition may not be ordered.

The first petition for review was filed in the Tenth Circuit by Sunray DX Oil Company and other producers. After procedural skirmishes,[3] petitions for review of Opinion No. 422 pending in other circuits were transferred to the Tenth Circuit pursuant to 28 U.S.C. § 2112(a). The producers filed motions for leave to adduce additional evidence. These motions were deferred to the hearing of the petitions on the merits. The proceedings were held in abeyance for a time in anticipation of the decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

An understanding of the issues will be helped by a brief recitation of the Commission actions and the court decisions which make up the background. The decision in *Atlantic Refining Co.* v. *Public Service*

[2] 15 U.S.C. §§ 717–717w.

[3] See *Amerada Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 338 F. 2d 808; and *Sunray DX Oil Company* v. *Federal Power Commission*, 10 Cir., 351 F. 2d 395.

Commission of New York, 360 U.S. 378 (CATCO), directed the Commission in certificate cases to keep initial prices in line. Thereafter, on September 28, 1960, the Commission promulgated its Statement of General Policy No. 61–1.[4] This was issued concurrently with Opinion No. 338 in *Phillips Petroleum Company.*[5] The Policy Statement established 23 rate areas, including District No. 4 involved herein, and with unimportant exceptions announced maximum rates for each area. In *Phillips,* the Commission held that the regulation of independent producers under the Act could be accomplished more appropriately by the establishment of area rates than by the establishment of producer rates on individual cost-of-service findings.[6] The Policy Statement established a guideline initial rate for District No. 4 of 18 cents per Mcf.

On August 30, 1962, the Commission issued Opinion No. 362 in *Skelly Oil Co.,* 28 FPC 401. That proceeding involved applications under § 7 for permanent certificates covering sales of gas produced in District No. 4. Therein the Commission disposed of all applications under contracts executed prior to September 28, 1960, the date of the Policy Statement, by the imposition of a 15-cent initial price condition and deferred decision on sales under four contracts bearing a later date. On the same day as the *Skelly* decision, the Commission promulgated its Fifth Amendment to the Statement of General Policy No. 61–1, 28 FPC 441, reducing the guideline initial rate in District No. 4

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[4] 24 FPC 818.

[5] 24 FPC 537, affirmed D.C. Cir., 303 F. 2d 380, 373 U.S. 294.

[6] The first area rate proceeding was initiated by Commission order dated December 23, 1960, 24 FPC 1121, and culminated in Opinions Nos. 468 and 468–A filed in August and October, 1965, and now under review in this court. See *Skelly Oil Company* v. *Federal Power Commission,* No. 8385, and companion cases.

from 18 cents to 16 cents effective the same date. The four applications which had been severed from *Skelly* were then consolidated with a number of applications covering District No. 4 sales under contracts made between September 30, 1960, the date of the Policy Statement, and August 30, 1962, the date of the *Skelly* decision and the Fifth Amendment. The consolidated proceedings went forward under the style *Amerada Petroleum Corporation, et al.*, Docket Nos. C162 etc.

In its order for the consolidated hearing the Commission stated:

> In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15-cent per MCF price which we found to be the in-line price as of September 28, 1960, the 16-cent price which is being adopted as the future area ceiling price for this area, or the 18-cent per Mcf price established on September 28, 1960.

The applications covered initial contract-based rates from 15.9 cents to 19.8 cents.[7] During the pendency of their applications for permanent certificates, numerous producers requested and received temporary authorizations under § 7(c) of the Act and § 157.28 of the Commission regulations thereunder.[8] These were issued *ex parte* and without notice or hearing. Many of the temporary certificates did not contain an express refund condition.

The *Amerada* proceedings before the Examiner went forward contemporaneously with the judicial review of the *Skelly* decision, Opinion No. 362. In *Amerada*

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[7] There was only one proposed price at 19.8 cents. The next highest was 18 cents. The proponent of the 19.8-cent price is not seeking review of the Commission action.

[8] 18 C.F.R. 157.28.

the producers offered, and the Examiner declined to receive, testimony and exhibits covering economic and financial requirements. Texaco Inc. sought to obtain the disclosure and production of Commission records pertaining to the establishment of the guideline initial prices in the Policy Statement and the Fifth Amendment. This was denied. Review of the Commission actions upholding the Examiner on these two evidentiary issues was sought and denied in *Texaco Inc.* v. *Federal Power Commission,* D.C. Cir., 329 F. 2d 223, certiorari denied 375 U.S. 941, on the ground that under § 19 the petitions for review were premature.

A Commission staff economist presented, and the Examiner received in evidence, Exhibit 16. This exhibit is a summary of price and other information for all District No. 4 contracts dated 1955 or later, filed as rate schedules with the Commission, and calling for a price of at least 14 cents.[9]

The Examiner's decision, issued July 23, 1963, recommended the grant of permanent certificates of public convenience and necessity to all producer applicants on specified conditions, two of which are pertinent here. The initial price was to be no greater than 15 cents per Mcf and no refunds were required of producers selling gas under temporary authorizations which did not contain any specific refund condition. Both the producers and the distributors filed exceptions to the Examiner's decision.

While the matter was pending before the Commission, the District of Columbia Circuit decided the *Skelly* case.[10] That decision affirmed the 15 cent in-

[9] The witness said that he excluded sales below 14 cents because "the 14 cent level is the lower suspension level of Commission Policy Statement 61–1."

[10] *Public Service Commission of the State of New York* v. *Federal Power Commission,* D.C. Cir., 329 F. 2d 242, certiorari denied *sub nom. Pardo Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963.

line price established by Opinion No. 362 for District No. 4 sales under contracts made before September 28, 1960, and reversed the Commission holding that refunds could not be required when the temporary authorization contained no express refund condition.

By its Opinion No. 422, here under review, the Commission upset the Examiner on both the price and refund issues. It fixed the in-line price at 16 cents per Mcf and deferred the question of refunds under contracts having no express refund conditions.

With this background we first consider the rejection of the proffered evidence. Several producers jointly tendered testimony and exhibits covering economic and geologic factors pertinent to the area. The showing was that exploratory and drilling costs have substantially increased between the time when the majority of contracts in *Skelly* had been executed and the execution of the contracts with the prices here in dispute; that the public interest required further exploratory and drilling efforts in the area because of increasing demand and lessening supply; and that the public convenience and necessity required initial contract prices up to and including 18 cents per Mcf. The Commission upheld the Examiner's decision to exclude the evidence because it was not relevant to a § 7 proceeding where the test is public convenience and necessity rather than the determination of a just and reasonable rate.

CATCO [11] holds that the Act does not require a determination of just and reasonable rates in a § 7 proceeding; that if a proposed price is "out of line" the Commission may impose conditions; and that to protect the public interest the Commission acts in a § 7

[11] 360 U.S. 378, 390–392.

proceeding "to hold the line awaiting adjudication of a just and reasonable rate." *CATCO* does not define the "line" and does not fix standards by which a determination may be made of whether a price is "in line" or "out of line."

In *Callery* the Supreme Court said that under § 7 "adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." [12] With reference to cost and economic trend evidence, the Court mentioned the experience of the Commission, said that the Commission "properly and constructively exercised its discretion in declining to consider this large quantity of evidence," and concluded that the rejection of such evidence is "an appropriate step" in the streamlining of Commission procedures.[13]

The producers seek to avoid the impact of *Callery* by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither *CATCO* nor *Callery* establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity. We do not say that economic and geologic evidence is never admissible in a § 7 proceeding. This may depend on varying circumstances. All we say is that in the posture of this case the Commission did not abuse its discretion by rejecting the evidence.[14]

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[12] 382 U.S. 223, 227.

[13] *Id.* at 228, note 3.

[14] See *Public Service Commission of the State of New York v. Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 246-247.

By request to the Examiner and by application for a subpoena duces tecum and ad testificandum, Texaco Inc. sought to obtain the disclosure of the data and materials underlying and supporting the price levels for initial sales in District No. 4 as announced by the Commission in its Policy Statement and in the Fifth Amendment thereto. In sustaining the Examiner's denial, the Commission pointed out that the burden is on a producer-applicant to prove that a certificate is required by the public convenience and necessity; that the effect of the Texaco motion is to place on the Commission the burden of justifying the price expressed in the Policy Statement; and that Texaco had demonstrated no reason for the production of the documents and issuance of a subpoena as requested. Consideration of this problem is entwined with the intent and effect of the Policy Statement.

We have noted that the Policy Statement fixed an 18-cent price, that *Skelly,* Opinion No. 362, fixed a 15-cent price for the period prior to the issuance of the Policy Statement, that the Fifth Amendment to the Policy Statement fixed a 16-cent price, and that we are here concerned with contracts executed between the date of the Policy Statement and the date of the Fifth Amendment. The producers argue that the Policy Statement established an 18 cent in-line rate. The distributors contend that *Skelly* established a 15 cent in-line rate. None of the petitioners are happy with the 16-cent rate which the Commission decreed.

The basic claim of the producers is that the Policy Statement set in-line prices on which they were entitled to rely. In our view this is a misconception of the Commission action. The Policy Statement is just what it purports to be—an ex parte statement issued without hearing by an agency to advise the public properly of the manner in which the agency

proposes to exercise a discretionary power. Reference is made therein to "price standards" and "price levels." The purpose is that of "guidance and initial action by the Commission." The effect is that, "in the absence of compelling evidence calling for other action," producer applications for certificates proposing higher rates than those listed will be either denied or conditioned. The result is that the Policy Statement plays a "significant role" in arresting the upward trend of producer prices.[15]

The announcement of a guide to price levels or price standards is not the establishment of an in-line price. That is accomplished after notice and hearing in an appropriate proceeding—not in a policy declaration. No doubt designedly, the Commission did not specify the formula which it used in arriving at the guideline rates. Its failure to do so may put a burden on producers and distributors alike in any attempt to show that a guideline price should or should not be adopted as an in-line price. The presence of such burden neither requires nor permits a party to go back of the Policy Statement in search of its justification. That is the administrative concern of the Commission. It follows that the request and application of Texaco for the underlying data and materials were properly denied.

The Commission may not rigidly and arbitrarily impose a guideline price as an in-line price. The Policy Statement recognizes that compelling evidence may call for action other than granting a certificate at the guideline price. The point is that, in the context of the proceedings before us, the establishment in 1960 of the 18-cent guideline cannot be ignored by the Commission in arriving at the in-line

[15] *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 312–313.

price.[16] Its effect had to be, and was, evaluated by the Commission.

The other extreme of the dispute is the position of the distributors who say that the 15-cent price established in *Skelly*, Opinion No. 362, for contracts executed prior to the date of the Policy Statement is the in-line rate which is presumed to continue until a just and reasonable rate has been determined in an area rate proceeding.[17] We agree with the distributors that the in-line procedure is an interim device and is not intended to be a permanent method of producer regulation. It is a necessary device because of the complex and time-consuming processes incidental to the establishment of a just and reasonable rate.[18] The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.

The Commission has recognized that the in-line price must reflect current conditions.[19] The Courts

[16] In *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 247, the court said: "The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion."

[17] The just and reasonable rate for the sales certificated by the Commission in the order under review will be fixed in the *Texas Gulf Coast Area Rate Proceeding*, AR64–2, now in hearing before a Commission Examiner.

[18] The *Permian Basin Area Rate* case was before the Commission for nearly five years. See *supra* note 6.

[19] See Opinion No. 362, *Skelly Oil Company*, 28 FPC 401, 408; Opinion No. 412, *Hassie Hunt Trust*, 30 FPC 1438, 1442; Opinion No. 436, *Union Texas Petroleum*, 32 FPC 254, 260.

of Appeals have agreed,[20] Further support is found in the *Callery* decision where the Supreme Court referred to "other contemporaneous certificates" and "prices higher than existing levels."[21] We concur with the Commission that once the in-line price is established it is presumed to continue not until the just and reasonable rate is determined but until "substantial evidence is presented that it has changed."[22]

Thus we reach the heart of the Commission's decision. The question is whether substantial evidence sustains the 16-cent price. All the petitioners say that it does not.

The basis for the Commission's action is Staff Exhibit No. 16 which lists the provisions of gas sales in District No. 4 "dated 1955 and later with total rates of 14.0¢ Mcf and higher as accepted for filing by the Federal Power Commission as of 8–31–62." The Commission analyzed the figures presented and compared the initial contract prices for the two years here under consideration with those pertinent to the *Skelly* proceeding where the 15-cent price was fixed for sales contracted before the date of the Policy Statement. It found that in the later period 82% of the gas moving in interstate commerce was at initial contract prices of 16 cents per Mcf and higher, and that the weighted average price for the period was 17.176 cents per Mcf. For the earlier period the weighted average

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[20] In *United Gas Improvement Co.* v. *Federal Power Commission*, 9 Cir., 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, the Court said: "As previously indicated the price line is intended to reflect current conditions in the industry." See also *Sohio Petroleum Company* v. *Federal Power Commission*, 10 Cir., 298 F. 2d 465, 467; and *Atlantic Refining Company* v. *Federal Power Commission*, D.C. Cir., 316 F. 2d 677, 680.

[21] 382 U.S. 223, 227.

[22] *Superior Oil Co.*, Opinion No. 437, 32 FPC 241, 243.

was 16.5 cents. This shows an increase of more than six-tenths of a cent for the later period. The Commission pointed out that the lowest selling price for substantial quantities of gas during the period in question was 16 cents and concluded that the public convenience and necessity required the issuance of the certificates at that price.

The distributors argue that the Commission considered and acted on suspect prices. *United Gas Improvement Co.* v. *Federal Power Commission,* 9 Cir., 283 F. 2d 817, 824, holds that it is an abuse of discretion for the Commission, in establishing a price line, to rely upon producer prices which are under review in pending court and Commission proceedings. In that case and the decisions of the Courts of Appeals which followed it[22] there were both numerous uncontested contracts available for consideration and certificates which the courts had rejected because of their issuance at excessive price levels.

The Examiner limited his consideration to sales under contracts which were made during the pertinent period and for which permanent certificates had been issued. The Commission found that the effect of this limitation was to arrive at an in-line price on the basis of only 1.39% of the volumes for all sales shown. In the *UGI* decision of the Ninth Circuit, mentioned above, the court said that the

[22] See *United Gas Improvement Co.* v. *Federal Power Commission,* 5 Cir., 290 F. 2d 147, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965; *Public Service Commission of New York* v. *Federal Power Commission*, D.C. Cir., 287 F. 2d 146, certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880; *United Gas Improvement Company* v. *Federal Power Commission*, 10 Cir., 287 F. 2d 159; and *California Oil Co., Western Div.* v. *Federal Power Commission*, 10 Cir., 315 F. 2d 652.

line "may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce." [24]

Thus we have here a situation vastly different from that presented in the cases which have dealt with the suspect price doctrine. Exhibit 16 included the sales under consideration in the very proceedings in which the exhibit was presented. The distributors say that this is an impermissible bootstrap procedure. The producers in turn say that the reason for the small percentage of sales free from attack is the action of the distributors in contesting all sales above the price which is acceptable to the distributors.

In the determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. At the same time, when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries. In fixing the 15-cent price for District No. 4 sales which preceded the Policy Statement, the Commission in *Skelly* gave a "limited degree of consideration" [25] to the price range of contracts resulting in temporary certificates although it recognized that they were not "as persuasive" [26] as permanent certificates. The price fixed in *Skelly* was upheld by the District of Columbia Court of Appeals which commented that the Commission gave "less consideration" to the temporary certificates than it did to the permanents.[27]

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[24] 283 F. 2d 817, 823.

[25] 28 FPC 1065, 1068.

[26] 28 FPC 401, 409.

[27] *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 245–246.

An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the "suspect price" doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the "unreviewable fiat" of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates.

The producers say that the in-line price for permanent certificates should be the highest price at which substantial quantities of gas move in interstate commerce and that here the Commission has fixed the lowest rather than the highest price.[28] The producers rely on the statement in *Callery* that:[29] "We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." This language does not mean that the public interest is not protected if the sales are approved at less than existing levels.

The distributors point to the decision in *Atlantic Refining Co.* v. *Federal Power Commission*, D.C. Cir., 316 F. 2d 677, 679, which says that "if the Commission is to err in setting an initial rate, it should err on the low side" because of the right of a producer to file immediately for a rate increase under § 4.

[28] The opinion of the Commission says: "The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf." 31 FPC 623, 637.

[29] 382 U.S. 223, 227.

From this premise they argue that the 15-cent price of *Skelly* should have been adopted. The provisions of § 4, although they may not be disregarded, are not a complete answer. Rate increases filed thereunder are subject to suspension. The producers may have the use of the money collected but it is at interest if refunds are ordered and royalty and tax payments have to be made on the total amount collected. If the just and reasonable rate as finally determined is greater than the in-line rate adopted, the producers have no way of recouping their losses.[30] Our view is that the possibility of filings for increased rates under § 4 does not require that the Commission fix the price in a § 7 proceeding at a figure lower than that at which substantial volumes of gas are currently contracted for sale in interstate commerce.

Both producers and distributors attack the 16-cent price on the ground that it results from an improper use of, and reliance on, agency expertise. For over 12 years since the decision in *Phillips Petroleum Company* vs. *Wisconsin*, 347 U.S. 672, the Commission has been struggling to regulate the independent natural gas producers under an act which is not well designed for the attainment of that objective. Serious administrative problems have developed. Procedures and methods have changed from time to time. Whether those now in use will receive full judicial approval remains to be seen. In the economic regulation with which the Commission is concerned the experience of the past must be projected into the future. The importance of expertise may not be

[30] An example is found in the pending *Permian Basin Area Rate* proceedings. The Policy Statement fixed the guideline price at 16 cents but the just and reasonable rate for new gas sold under contracts dated after January 1, 1961, was fixed at 16.5 cents.

downgraded. A delicate balance must be maintained between producer and consumer interests if the continued life of the industry is to be assured.

We have noted that an in-line price continues until substantial evidence shows a change. The producers point out that the Commission controls the variables which would result in a change by rejecting evidence both of producers' costs and of initial prices which it considers suspect. The potential for circuity of action does not impress us too much. The cost evidence has been refused because it goes to the just and reasonable rate issue. In a § 7 proceeding the test is public convenience and necessity and evidence relevant thereto should be received. In the applications before us this evidence, in large measure, has taken the form of a showing of contract-determined initial prices. The Commission has given consideration to prices under temporary authorizations and under permanent certificates. Greater weight has been given to the permanent than to the temporary certificates. Some prices have been discounted as too high and some as too low. We believe this is proper. Here, at least, the result reached has not come from the use of a crooked yardstick.

The analysis and use of field prices established by producer-pipeline contracts require expertise. Objections to the use of weighted averages are not well taken. Such averages are necessarily lower than the highest prices paid. At the same time nothing is wrong with the use of weighted averages to compare price levels. Here the Commission has made such comparisons. These are proper as long as the action is not capricious or arbitrary.

It is apparent that in the case at bar the Commission was confronted with a difficult situation. *CATCO* tells it to hold the line. The Ninth Circuit

UGI decision[31] says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."[32] We find no abuse of discretion and affirm the 16-cent price.

The path from the morass of in-line prices leads directly to the thicket of refunds. Here again the traveled way is not well marked and we have a three-way disagreement among the parties over the route to be followed.

In the consolidated proceedings before the Commission, 27 of the 35 dockets related to applications in which temporary certificates had been issued without any express refund condition.[33] The Examiner

[31] 283 F. 2d 817.

[32] *People of the State of California* v. *Federal Power Commission*, 9 Cir., 353 F. 2d 16, 23. See also *Charleston & Western Carolina Railway Company* v. *Federal Power Commission*, D.C. Cir., 234 F. 2d 62, 64.

[33] In the remaining 8 applications a typical authorization is conditioned upon the refund to purchasers of "any amounts collected plus interest at 7 percent per annum in excess of 15.0 cents per Mcf which may be determined to be in excess of the price required by the public convenience and necessity."

held that on the authority of Opinion No. 362, *Skelly*, he had no power to order refunds when the temporary certificate did not contain an express refund provision. While the proceedings were pending before the Commission on exceptions, the District of Columbia Circuit reversed the pertient holding in Opinion No. 362.[34] On the authority of that decision the Commission reversed the Examiner on the refund issue and held that "the public interest would best be served by deferring for the present the decision whether refunds should be ordered * * *, and if so, the extent of such refunds." The Commission said that the parties "will be given an opportunity to submit further briefs on the issue of refunds."

At the outset we are met by the Commission argument that the refund issue is not now reviewable because § 19(b) makes aggrievement a jurisdictional prerequisite to review of Commission orders and here aggrievement is absent because no refunds have been required. In denying the Commission motion to dismiss the *Sunray* petition[35] we held that Sunray was likely to suffer injury by the determination of the in-line price and that the threat of refunds made it an aggrieved party.

The threat has been followed by action. On July 27, 1966, the Commission issued Opinion No. 501 in the *Amerada* consolidated dockets which were con-

[34] *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963.

[35] *Sunray DX Oil Company* v. *Federal Power Commission*, 10 Cir., 351 F. 2d 395, 400. The position of *Sunray* is important because all other petitions to review are transfers from other circuits.

sidered in Opinion No. 422 here under review.[36] Opinion No. 501 says that the producers therein listed "will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates" with the exception of certain royalty and tax payments not pertinent here. The producers listed include Sunray and six others who are petitioners in these proceedings. They are required to report their excess collections and hold them subject to the further order of the Commission "directing the disposition of those amounts."

Opinion No. 422 as implemented by Opinion No. 501 adversely affects Sunray and the other six producers. Although payment itself is not yet required, the producers are told that the excess collections do not belong to them. The only thing which remains to be decided is the question of who gets the money and under what conditions. This is not a case like either *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 5 Cir., 357 F. 2d 232, or *United Fuel Gas Company* v. *Federal Power Commission,* 4 Cir., —— F. 2d ——. They related to an order directing that refunds generated by a settlement agreement be retained by the producer pending Com-

[36] This opinion was called to our attention during the argument of the *South Louisiana* cases, our Docket Nos. 7912, etc., *Pan American Petroleum Corporation, et al.* v. *Federal Power Commission.* We also have pending before us Docket No. 9000—*Skelly Oil Company* v. *Federal Power Commission*—which seeks review of Commission Opinion No. 492. A court may take judicial notice of its own records. *Dial* v. *Johnson,* D.C. Cir., 259 F. 2d 189, 190. Although Opinions Nos. 492 and 501 were issued after the case at bar had been argued orally and submitted for decision, they are not controverted and the demands of justice require that we notice them. See *Ellis* v. *Cates,* 4 Cir., 178 F. 2d 791, 793, certiorari denied, 339 U.S. 964.

mission inquiry into whether release of the refunds to the pipelines would be proper. There the obligation to refund was fixed by the settlement. Here the obligation to refund is fixed by a Commission order. A producer has a right to a prompt determination of its liability. We believe that the question of the power of the Commission to order refunds of amounts collected under temporary certificates containing no express refund condition is ripe for determination and that proper judicial administration requires that it be deferred no longer.

Temporary certificates are issued ex parte and without hearing under § 7(c) of the Act in accordance with Commission Regulation § 157.28(c).[37] A party aggrieved by the issuance of such certificate has the right to judicial review.[38] The first attack on the absence of an express refund condition in the temporaries here under consideration came when the distributors, during the pendency of the proceedings before the Examiner, moved for the termination of the temporaries or in the alternative for a floorless refund condition. The Commission denied the motion. It declined to impose the refund condition because "we think clearly this would not be a proper action for us to take here." It further said that such action "would so denature the value of a commission authorization as to place any reliance upon our actions in this area in serious jeopardy" and that "we find it would be contrary to the public interest, as well as inequitable, to condition the temporary cer-

[37] 18 C.F.R. § 157.28(c). *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 327 F. 2d 893, 896, upholds the applicability of § 7(c) to independent producers and the validity of the regulation.

[38] *Id.* at 895. The Court there held that the New York Public Service Commission had the right to petition for the review of an order granting a temporary certificate.

tificates" as requested by the distributors. The distributors did not seek review. We do not accept the producers' view that the unreviewed denial of the motion irrevocably determined the refund issue. The Commission could change its mind. At the same time the reasons given for the action are most compelling and show mature consideration of the problem.

The distributors emphasize the importance of refunds to the protection of the consumer interests. This may be conceded to the extent that refunds are passed down to the ultimate user. These benefits must be weighed against the desirability of the maintenance of an adequate supply of gas. A repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers. We will not speculate on the effect of such repricing on their exploration and development activities. The benefits derived from such costly activities may or may not be of greater value, from the public standpoint, than the few dollars recovered by the home consumer. Perhaps he would rather have an assured supply for his expensive appliances than a modest refund. In any event the record does not purport to cover such issues and we turn to the decisions which the parties say control the outcome.

In our opinion the *Callery* decision [39] does not dispose of the issue presented here. The Supreme Court was there concerned with South Louisiana prices which had been the subject of much litigation.[40] The Court recognized that the Commission may not make

[39] *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

[40] See *CATCO*, 360 U.S. 378, and *Public Service Commission of the State of New York* v. *Federal Power Commission*, 361 U.S. 195, reversing 269 F. 2d 865. See also cases cited *supra* note 23.

reparation orders but said that "it is not so restricted where its order, which never became final, has been overturned by a reviewing court" and that "judicial review at times results in the return of benefits received under the upset administrative order."[41] The situation here is different. This is the first judicial review of the prices under consideration and we uphold the Commission on its in-line rate.

In *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 10 Cir., 270 F. 2d 404,[42] Sunray applied for temporary authority which was granted on the condition that an undertaking be filed "to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity." We pointed out that Sunray was required "to speculate" as to what the rate might be and was denied "its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."[43]

We have noted that Commission Opinion No. 362 pertaining to District No. 4 sales made under contracts executed prior to September 28, 1960, was set aside by the District of Columbia Circuit on the refund issue.[44] The Court there held that the "power [to order re-

[41] 382 U.S. 223, at 229.

[42] The *Sunray Mid-Continent* case considered two consolidated petitions for review. We are here concerned with No. 6061.

[43] 270 F. 2d 404, at 408–410.

[44] The Supreme Court denied certiorari to review the District of Columbia Circuit decision. See *Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963. Denial of certiorari "imports no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U.S. 482, 490, and *Pan American Petroleum Corp.* v. *Federal Power Commission*, 10 Cir., 352 F. 2d 241, 243.

funds] does not depend upon an explicit refund provision in a temporary certificate."[45] The Court went on to say that the exercise of the power was not "mandatory" and that the "refund issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates."[46]

The Court quoted the general language of the temporary certificates[47] that "acceptance for filing shall not be construed as constituting approval of any rate" and that authorization and acceptance of the rate schedule "are without prejudice to such final disposition of the certificate application as the record may require." It then concluded that "all else aside" these provisions authorize the conditioning of a permanent certificate by a refund requirement.

In our opinion these provisions mean that the Commission is not binding itself, by the issuance of a temporary certificate, to issue an identical permanent certificate of prospective effect after a hearing.[48] In its denial of the distributors' motion for refund con-

[45] 329 F. 2d 242, at 249.

[46] *Id.* at 250.

[47] This language is quoted in 329 F. 2d 242, at 249 and is the same as that found in the temporary certificates which are in the record before us and which do not contain express refund conditions.

[48] Included in the dockets considered by the Commission in this consolidated proceeding was No. C162-276 in which a temporary certificate was issued to, but not accepted by, Sun. It contained a definite refund obligation covering collections at a rate above 15 cents per Mcf and the provision that: "This temporary certificate and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require." The inclusion of this routine language could not mean that the explicitly floored refund obligation became floorless.

ditions the Commission gave no recognition or effect to such provisions. We believe that the Commission intended the routine, boiler-plate language to have a purpose entirely different from that of an express refund condition.

When a producer dedicates its gas to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval."[49] If the language mentioned means that a producer accepting such certificate without express refund conditions dedicates its gas without any floor on the rate, the producers have taken many uncalculated and uncalculable risks. We suggest that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance.

The situation in the case at bar differs from that presented to the District of Columbia Circuit. The proceedings there involved § 7 applications for permanent certificates covering District No. 4 sales under contracts executed before the issuance of the Policy Statement. Here we are concerned with sales under contracts made between the date of the Policy Statement and the date of the Fifth Amendment. For that period the guideline initial rate was 18 cents. The temporary certificates with which we are concerned were issued "at prices not exceeding 18¢ per Mcf."[50] The 18-cent figure is significant and meaningful.[51] It resulted from the exercise of Commission expertise. When the producers dedicated their gas under temporary certificates permitting the collection of prices up

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[49] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156. See also § 7(b) of the Act.

[50] See Opinion No. 501.

[51] See *Sohio Petroleum Company* v. *Federal Power Commission*, 10 Cir., 298 F. 2d 465, 468.

to 18 cents without express refund obligation, they were entitled to rely on them. They were entitled to rely on the prior decisions of the Commission declining to order refunds of collections under unconditionally authorized temporary certificates.[52] For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate. We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed so that it may make an intelligent decision whether to accept or reject the certificate. Such was our holding in *Sunray Mid-Continent* and we adhere to it. In our opinion, absent the special considerations recognized in *Callery,* refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

The motions to adduce additional evidence are severally denied. The cases are all remanded for further proceedings consistent with this opinion.

SETH, *Circuit Judge,* dissenting in part: I respectfully dissent on the issue of the "in-line" price because the Commission, in its determination of this issue in the consolidated cases here on review, has adopted a new concept of "in-line" which constitutes too wide a departure from prior usage and practice and from the authorities to be approved.

The Commission has here divided the range of prices into several segments, and has announced that the price here to be certificated is the lowest seg-

[52] See dissenting opinions of Commissioner O'Connor in Opinions Nos. 492 and 498.

ment, "* * * the lowest price at which substantial volumes of new gas were sold in interstate commerce * * * ." The Commission is very candid in its selection of this lowest price. Its findings and its comments on the evidence show that a higher price would otherwise follow. For example, the Commission stated that the evidence "* * * points in the direction of a higher price * * * ," than 16 cents which was the price here adopted. The Commission also said: "Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed."

The Commission also found that only a price above 18 cents "* * * would have an adverse impact on the pricing structure in the area."

The selection of the lowest segment is explained by the Commission in its opinion where it states: "In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications."

To provide some factual material on this particular issue, reference should be made to the evidence upon which the Commission placed its principal reliance, if not its sole reliance. This consisted of the following:

1. The Commission's Statement of General Policy No. 61–1, September 28, 1960, 24 F.P.C. 818, announcing an 18 cent guideline price.

2. The Fifth Amendment to Statement of General Policy No. 61–1, August 30, 1962, 28 F.P.C. 441.

3. Staff Exhibit No. 16, admitted at the hearing, which consisted of a summary of field prices under

contracts executed between January 1, 1955, and August 31, 1962, for sales in Texas Railroad Commission District No. 4 on file with the Commission and having a total initial rate of 14 cents per M.c.f. This exhibit included permanent certificates, temporary certificates, and the sales which were in issue in the consolidated proceedings.

Of the above several exhibits, the Commission considered Staff Exhibit No. 16 as the most important. The opinion of the Commission with reference to this exhibit, and to the period in issue, shows the following:

1. The weighted average price by volume was above 17.178 cents.

2. Eighty-two per cent of the gas sold was at 16.0 cents *and above.*

3. Seventy-one per cent of the gas was being sold at 17.0 cents *and higher.*

4. The table in the Commission's opinion with reference to this Exhibit also shows that twenty-seven per cent of the gas was sold at 16 cents *and below* and twenty-eight per cent at 16.5 cents *and below.*

The Commission found that 16 cents was the "in-line" price and stated, as referred to above, "* * * the record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area in the period in question was 16 cents per M.c.f."

The use in the text of the opinion of the term "and above" in the finding that eighty-two per cent of the gas passed at 16 cents and above appears to be somewhat unusual in view of the Commission's selection of the lowest price. It would appear that the reference to percentages or quantities of gas would instead include the amounts which passed at a figure of 16 cents or less. The opinion itself shows that some ten per

cent of the gas was sold *at 16 cents,* some eleven per cent of the gas was sold at 16 cents to 16.5 cents, inclusive, and twenty-seven per cent at 16 cents *and below.*

As stated above, it is however not necessary to demonstrate by the figures that the Commission selected the lowest segment by reason of their recitation that they were so doing. In this consideration it should also be borne in mind that the Commission also found that there would be no adverse impact on the pricing structure in the area except by a price above 18 cents.

There would seem to be no question but what an "in-line" price is to be determined on the basis of contemporaneous certificates as stated by the Supreme Court, and on contemporaneous contracts where necessary. This price must represent the prevailing current conditions as the Commission states in its opinion. *United Gas Improvement Co.* v. *Federal Power Comm'n,* 283 F. 2d 817 (9th Cir.). The Supreme Court has clearly stated that the "in-line" price is a device which will prevent gas from entering the interstate market " * * * at prices higher than the existing levels * * *."; and "* * * consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect.'" *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223. Also "where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in the triggering of general price rises * * *." *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378.

The Commission in its determination of the "in-line" price in this case by an adoption of the lowest

price departed from the "current conditions test," and the "existing levels test," referred to by the Supreme Court. This departure represents a basic change in policy, and is not just a difference in what quantity may constitute a "substantial quantity." The Commission did not base its decision on such a distinction. It clearly and candidly selected the lowest segment of the price range. The Supreme Court in its references to current conditions can only mean the prevailing of predominant conditions existing in the area and cannot mean the lowest or the highest of the prices, for such are not typical or prevailing prices. In common usage something "in-line" is in conformance with other persons or things; it is, to borrow a phrase from the civil rights vocabulary, "in the mainstream"; it is a "prevailing price," a "going rate." It is not of the extreme in any direction, it is not the widest, the longest, the lowest, or the highest.

The Commission properly used the permanently certificated prices, and the temporary certificates prices, including the prices in issue here. I agree with the majority that these contracts or prices elsewhere referred to as "suspect" must be used in this case. They must be used for all purposes. This was the only data available for a realistic consideration of the issues, the economic data of the petitioners having been excluded. The Commission considered all the certificates in order that it could have before it a "substantial quantity" of gas. It rejected the examiner's limited consideration with the following language:

> Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the "in-line" price amount to only 1.39 per cent of the volumes for all sales shown and to no more than 2.05 per-

> cent of the sales permanently certificated in the District contained in the exhibit.

and

> * * * In such circumstances it can hardly be maintained that the "in-line" test of the "prices under which a substantial amount of natural gas presently moves in interstate commerce" has been fully met by the examiner. In our opinion it would be manifestly improper to base an "in-line" price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets.

Thus all were considered to attain a sufficient volume, and the Commission did not and could not then disregard the temporary certificates on the price issue. Nor did the Commission state in its opinion that the temporary certificates were to be given less weight in its determination in this case. There is also no indication that they were given less weight other than the arguments in the briefs. The Opinion of the Commission in its explanation as to why the temporary certificates should be considered referred to its *Texaco Seaboard* case, 29 F.P.C. 593, where it said permanent certificates are decidely more persuasive than are temporary, but continued "* * * this does not thereby render temporary authorizations *per se* inadmissible." The Commission then said:

> The soundness of this principle is readily apparent when viewed in the light of the facts before us, where, absent the ability to consider these authorizations, we would not be basing our decision upon "substantial volumes of gas moving in interstate commerce."

The Commission then refers to the examiner's consideration quoted above. These references are only to *what* should be examined.

Thus the Commission considered the very large proportion of gas passing under temporary certificates, but did not state that this should receive less consideration or be given less weight than that permanently certificated. The Commission only stated:

> We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the "in-line" price for this period. Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the "in-line" level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed.

Thus from what is said in the Opinion, it cannot be concluded that the Commission has given less weight to the prices in the temporary certificates. With the minute percentage of the volumes considered being permanently certified, it would indeed require that the temporary certificates be virtually disregarded to explain a 16 cent price, and there is no indication that the Commission did so.

The Supreme Court has repeatedly said that the prices added as conditions to certificates under Section 7 do not constitute initial pricing by the Commission. *Federal Power Comm'n* v. *Hunt,* 376 U.S. 515. Thus the Commission is to set a price in the public interest and in line with current conditions

in the area, not what the Commission thinks is just and reasonable or to be on the "safe side," one way or the other, for that would clearly be initial pricing. The selection here by the Commission of the "lowest price" by the exercise of its expertise is initial pricing because it is not and does not purport to represent "current conditions."

This error by the Commission is one of law. It is the erroneous application of the standards set by the Supreme Court for the determination of "in-line" prices.

It would seem to be unnecessary to dwell on the importance of the Commission's determination of "in-line" prices; as the delays which are necessarily inherent in their determination and in any subsequent determination of just and reasonable rates are obvious. The period under consideration in these consolidated cases begins in 1960, and the case concerns certificates covering some 31,500,000 M.c.f. per year. It is apparent that the prices so established will remain in effect for many years, and consequently large quantities of gas will be sold under any determination of "in-line" prices by the Commission. The Supreme Court, in *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378, referred to the "inordinate delay presently existing in the processing of § 5 proceedings, * * * " and again in the same case to " * * * the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears well nigh interminable." These prices have in reality become more than a mere interim device, especially when coupled with moratoriums which may be imposed by the Commission.

Thus the importance of the "in-line" determination of the price additive to public convenience and necessity becomes all the greater. The Commission's

methods and the evidence used to support its findings must be more closely scrutinized.

Thus I would conclude that the Commission committed an error in law in applying the wrong standards for its determination of 16 cents as the "in-line" price in this case. This was selected, as the Commission states, as the lowest price, and I would remand the case for a determination not of the lowest price and not of the highest price, but of the "in-line" price.

On a somewhat different point I also disagree with the majority. Reference is made in the majority opinion to *Superior Oil Co.*, Opinion No. 437, 32 F.P.C. 241, and there is adopted a rule that the "in-line" price once established is presumed to continue until "substantial evidence is presented that it has changed." If this means that some sort of a presumption attaches to prior "in-line" prices which must be overcome, I disagree.

The authorities demonstrate clearly that the "in-line" price is to be determined on the basis of contemporaneous certificates, contracts, and price data. This necessarily contemplates the possibility of change from time to time in either direction. *Sohio Petroleum Co.* v. *Federal Power Comm'n,* 298 F. 2d 465 (10th Cir.). Once an "in-line" price is established, it continues for those bound until *formally* changed but this does not necessarily mean that a presumption attaches to a previous "in-line" price which must be overcome by any greater weight of evidence than would be required had no "in-line" price been established. There is no basis in the statutes for a presumption or continuing weight to be given to a prior determination in another proceeding. By definition the "in-line" price is what then prevails and not what has prevailed in the past nor influenced

by what has prevailed in the past. Whether the change is large or small should of itself make no difference in the determination; the changes from time to time should freely come about, based upon conditions as they may then exist.

APPENDIX B

I

United States Court of Appeals, Tenth Circuit

No. 7781

SEPTEMBER TERM, 1964

AMERADA PETROLEUM CORPORATION, SUNRAY DX OIL COMPANY, TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION, UNION PRODUCING COMPANY, JAKE L. HAMON, GEORGE H. COATES, EDWIN L. COX AND LAMAR HUNT, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition To Review Order of Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge:* This is a joint petition of six corporations and four individuals to review the respondent Commission's Opinion 422 and order of March 23, 1964, as affirmed on rehearing by Opinion 422–A and order issued May 27, 1964. The petitioners are all natural-gas companies within the meaning of the Natural Gas Act of 1938, as amended.[1] The petitions are brought under Section 19(b) of that Act. The same order of the Commission is under attack in the District of Columbia, Third, Fifth, and Sixth Circuits. The first petition filed was this one

[1] 15 U.S.C. § 717 et seq.

in the Tenth Circuit. Venue lies in the Tenth Circuit as to petitioner Sunray DX Oil Company but not as to the other petitioners.

Consideration must be given first to the Commission's motion to dismiss as to petitioner Sunray DX Oil Company for lack of jurisdiction. The Commission says that Sunray has lost its right to object to the order by failure to meet procedural requirements; and that, because Sunray is not aggrieved by the order, it may not bring a petition to review under Section 19(b).

We are met at the start by a barrier of the Commission's making. The Commission has not filed the certified record of its proceedings as required by Section 19(b). Instead it has moved for an enlargement of time for certification of the record "until further order of the Court after resolution of the preliminary issues." In its motion to dismiss Sunray and in its supporting statements and briefs the Commission repeatedly makes record references. Without the record these references are meaningless. In the circumstances we are limited to consideration of the allegations of the petition.

The petition shows that the petitioners entered into separate contracts with various interstate pipeline companies for the sale of natural gas produced from their respective properties located in Texas Railroad Commission District No. 4; that they filed their contracts with the Commission as rate schedules and concurrently filed Applications for Certificates of Public Convenience and Necessity to obtain authority to make their sales for resale in interstate commerce; that the Commission ordered a consolidated hearing; that at the hearing the petitioners jointly offered certain evidence in support of their applications; that the examiner rejected the evidence; that the decision

of the examiner granted the certificates with conditions attached; that the petitioners filed timely exceptions to the examiner's decision; that the Commission sustained the examiner on the rejection of the proffered evidence; and that the Commission held that certificates should be issued subject to the following conditions:

1. An initial price in excess of 16 cents per Mcf was prohibited;

2. Decision on refunds was deferred;

3. A moratorium on price increases in excess of 18 cents was ordered; and

4. Decision on take-or-pay-for contract provisions was made subject to disposition in a rule-making proceeding.

The petitioners duly sought rehearing and, on the same day the rehearing was denied, the petition to review was filed in this court. The petition sets forth the grounds on which relief is sought, incorporates a motion for leave to adduce additional evidence, and concludes with an appropriate prayer for relief.

We find that the petition satisfies the requirements of Section 19(b) and we decline to give consideration to matters said to be established by a record which is not before us. Without the record the grounds asserted in the Commission motion form no basis for the dismissal of Sunray.

The Commission has also moved to dismiss the petition on the ground that venue as to all the joint petitioners does not lie in the Tenth Circuit. The petition alleges venue only as to Sunray.

Section 19(b) provides that a person aggrieved by a Commission order may obtain a review of such order "in the court of appeals of the United States for any circuit wherein the natural-gas company to

which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia."

Section 2112(a) of 28 U.S.C. provides that if proceedings have been instituted in two or more courts of appeals with respect to the same order the board or commission concerned shall file the record in the court where the proceedings with respect to the order were first instituted. The other courts shall then transfer the proceedings before them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice the court in which the record is filed may "transfer all the proceedings with respect to such order to any other court of appeals."

Sections 19(b) and 2112(a) must be read and applied together. The quoted language of Section 19(b) indicates that it is premised on the concept of an order relating to one particular natural-gas company. The Commission has destroyed that concept by consolidating for hearing and disposition separate applications of natural-gas companies which have varying residences and locations of principal places of business. No good purpose would be served by exploring the ramifications of the resulting procedural problems. Each aggrieved party is entitled to a review. The charges and countercharges of forum shopping do not impress us. For better or worse the statutes permit a race to the courthouse with each party trying to get a hearing on its home grounds.

In our opinion the venue deficiencies require a dismissal of the petition as to all petitioners but Sunray. The rights of Sunray are separate and on the face of the pleadings it is entitled to a review of the order attacked. From a practical standpoint this result is

of little importance. The provisions of Section 2112(a) will now come into play.

The various motions are disposed of thus:

1. The Commission's motion to dismiss is granted as to all petitioners except Sunray;

2. The Commission's motion to dismiss Sunray is denied without prejudice to renewal after the record is certified to this court;

3. The motion to adduce additional evidence is deferred to the hearing on the merits; and

4. The motion of the Commission to enlarge the time for certification of the record is denied and the Commission shall file the entire record with the clerk within 15 days from the entry of this order.

II

United States Court of Appeals, Tenth Circuit

NOVEMBER TERM, 1964

No. 7781

SUNRAY DX OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Rehearing

Before BREITENSTEIN, HILL, and SETH, *Circuit Judges*

PER CURIAM

The Commission's petition for rehearing urges that the record is not necessary for a determination of whether Sunray was aggrieved and emphasizes the potential complications in procedure.

We have again reviewed the situation and are convinced that in the case before us the question of ag-

grievement cannot be determined without the record. The parties are not in agreement on the facts. In the absence of such agreement we will not decide the issue on unauthenticated documents attached as appendices to motions and briefs or on unilateral statements made in briefs and oral arguments. This is not a case like *Utah Power & Light Company* v. *Federal Power Commission*, 10 Cir., —— F. 2d ——, decided this day, in which the defect appeared on the face of the petition.

We are aware of the procedural problems mentioned by the Commission and we shall meet those problems when they arise. The procedural entanglements which postpone consideration on the merits of petitions to review Commission orders are regrettable and should have the careful attention of all parties in interest.

The Commission objects to our order which requires the filing of the entire record. We are now convinced that in the circumstances of this case the better procedure is to require a certificate of the materials comprising the record.

Except as stated herein the petition for rehearing is denied. The Commission, in accordance with our Rule 34(7), shall certify a list of the materials comprising the record and file such certificate with the clerk within ten days from the date of the entry of this order.

III

United States Court of Appeals, Tenth Circuit
MAY TERM, 1965

No. 7781

SUNRAY DX OIL COMPANY, PETITIONER
v.
FEDERAL POWER COMMISSION, RESPONDENT

On Petition To Review Order of Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge:* Sunray DX Oil Company and nine others filed a petition to review the Commission's Opinion 422 and order of March 23, 1964, as affirmed on rehearing by Opinion 422–A and order of May 27, 1964. We sustained the Commission's motion to dismiss all petitioners but Sunray and denied a similar motion to dismiss Sunray without prejudice to the renewal of the motion after certification of the record. See *Amerada Petroleum Corp.* v. *Federal Power Commission,* 10 Cir., 338 F. 2d 808. The Commission then, in accordance with our Rule 34(7), certified and filed with the clerk a list of the materials comprising the record, and renewed its motion to dismiss Sunray. Sunray moved for a clarification of the court's orders reported in 338 F. 2d 808, 810–811. Sun Oil Company then petitioned for leave to intervene. The two motions and the petition in intervention are now before us.

By its Opinion 422 the Commission issued permanent certificates of convenience and necessity to numerous independent gas producers, including Sunray and Sun, whose individual certificate applications had been consolidated for hearing and disposition.

Pursuant to § 19(b) of the Natural Gas Act,[1] petitions for review were filed in the District of Columbia, Third, Fifth, Sixth, and Tenth Circuits with the petition in the Tenth Circuit being filed first. Section 2112(a), 28 U.S.C., provides that if proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency concerned shall file the record in that court where the proceedings were first instituted and the other courts in which such proceedings are pending shall transfer them to the court of appeals in which the record has been filed.

Various petitioners have sought to have the actions filed in circuits other than the Tenth transferred to the Tenth Circuit. The Commission has successfully resisted such motions on the ground that transfer would not be proper until after the determination of jurisdiction in the Tenth Circuit.

Sun filed a petition to review Opinion 422 in the Third Circuit. After the Commission filed in the Tenth Circuit the certificate listing the materials comprising the record,[2] Sun moved for the transfer of its case to the Tenth Circuit. The motion was denied. This action made it impossible for Sun to proceed. Nothing could be done in the Third Circuit because the record was not there;[3] and Sun could do nothing in the Tenth Circuit.

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[1] 15 U.S.C. § 717r(b).

[2] Our Rule 34(7) provides in part: "The filing of a certified list of the material in the record and the holding of such material for and subject to the directions of the clerk of the court shall be deemed the full equivalent of the filing of the entire transcript of the record in the court." The Third Circuit has a similar rule. See its Rule 18(7).

[3] Similarly the petitioners in the District of Columbia, Fifth, and Sixth Circuits could not proceed because of the absence of the record.

Sun then moved to intervene in the instant case. The Commission opposed the motion saying that intervention is not proper because jurisdiction and venue are absent and because Sun has no legally protectible or recognizable interest in the Sunray petition. Our Rule 34(6) permits intervention in actions to review orders of administrative agencies and in proceedings under it we have never required that intervenors establish venue in this circuit.[4] The Commission's argument that Sun has no interest in Sunray's petition to review Opinion 422 is not persuasive. Sun was a party to the administrative proceedings which resulted in Opinion 422 and is substantially affected thereby.

In the situation presented intervention is a permissive matter. The circumstances are such that leave to intervene is granted. By this action we do not intend to say that in other circumstances we would permit intervention by one producer in an action brought by another producer to review a Commission order or that any relief may be granted to intervenor Sun in these proceedings. Sun is entitled to be heard and intervention is a proper vehicle to obtain a hearing.

Opinion 422 dealt with applications for certificates of convenience and necessity sought by producers of gas from properties located in Texas Railroad Commission District No. 4. These producers had contracted with pipeline companies for the sale of the gas. Sunray was an applicant for a certificate. Among other things the Commission by Opinion 422 prohibited an initial price in excess of 16 cents per

[4] See, for example, *Pan American Petroleum Corp.* v. *Federal Power Commission*, 10 Cir., 339 F. 2d 694, reversed on other grounds —— U.S. ——, June 7, 1965, 33 L.W. 3393.

MCF and ordered a moratorium on price increases in excess of 18 cents per MCF.

Sunray's application was filed on January 23, 1961, and covered a contract for sale of gas from one well to Tennessee Gas Transmission Company for a period of 20 years with an initial price of 17.24347 cents per MCF and an escalation to a maximum of 20.24347 cents per MCF.

On October 9, 1962, the attorney for Sunray wrote the Commission that the well from which it had been delivering gas to Tennessee was shut in, that Sunray had not obtained a cancellation of the gas sales contract and, that because of the lack of cancellation he understood that the Commission would not entertain an application to abandon.[5] The Commission's reply does not appear in the portions of the record reproduced for us. In any event the Commission continued Sunray as a party in the consolidated proceedings, and Opinion 422 and the order entered pursuant thereto apply to Sunray.

The examiner who heard the various applications pointed out in his decision made July 23, 1963, that the temporary certificates issued by the Commission

[5] The letter read in part: "This will serve to advise that the one gas well from which Sunray has been delivering gas to its purchaser, Tennessee Gas Transmission Company (Tennessee), pursuant to the temporary authorization issued Sunray in the captioned proceeding on February 14, 1961, has been shut-in since April 25, 1962, because of inability of the well to produce gas. Sunray's Engineering Staff has concluded that it is infeasible to do any further work on this well in an effort to make it again a producing gas well. However, no cancellation of the Sunray gas sales contract comprising Sunray's related Rate Schedule No. 210 has been obtained. It is Sunray's understanding that because of such fact, the Federal Power Commission (Commission) would not entertain an Application for Permission to Abandon at this time."

to certain applicants, including Sunray, "do not provide for refunds in the event that the initial public convenience and necessity price is found to be lower than the prices authorized under the temporary certificate authorizations," and did not order any refunds by those applicants. On this point the Commission disagreed with the examiner and held that: "The decision whether refunds should be ordered as a condition to the other certificates [including Sunray's] herein issued is deferred for subsequent determination."

The Comission says that Sunray is not aggrieved and cannot maintain a petition to review under §19(b).[6] The argument is that because Sunray is not producing or selling any gas under its contract with Tennessee, the only injury to Sunray is the possible obligation to make a refund and no such refund has been ordered.

The question is whether Sunray is presently aggrieved.[7] Sunray says that it is aggrieved because the order fixes an initial price lower than the contract price and that it presently has a right to contest that initial price because of its potential bearing on the refund issue.

After the examiner's decision in this case and before the Commission's opinion, the District of Columbia Circuit, in *Public Serv. Comm'n of New York* v. *Federal Power Commission,* D.C. Cir., 329 F. 2d 242, 250, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963, held that

[6] Section 19(b) reads in part: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commision in such proceeding may obtain a review of such order in the court of appeals of the United States * * *."

[7] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 10 Cir., 270 F. 2d 404, 407, 408.

the Commission could order refunds of any amounts collected over the in-line price established in § 7 proceedings even though the temporary certificate contained no refund provision.[8] Perhaps this decision had weight in influencing the Commission to reject the examiner's recommendation on the refund issue. In any event we are convinced that the Commission intends that the in-line price has an important, if not controlling, effect on refunds. Indeed Opinion 422 after referring to the exceptions taken to the examiner's decision says that the amount of refunds is affected by the resolution of the initial price question.[9] In neither brief nor oral argument does the Commission deny the effect of the price determination on the question of refunds.[10] The attitude of the Commission is a real and presently existing threat that the refund obligation of Sunray will be the difference between the collected contract price and the determined initial price.

[8] In its footnote 8 on page 250 the court points out that its decision may be inconsistent with the Tenth Circuit decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 10 Cir., 270 F. 2d 404.

[9] The language of the Commission is: "* * * all exceptions concern the initial price question in one form or another and even the amount of refunds is affected by the resolution of this issue." Mimeo copy of opinion p. 7.

[10] In commenting on the attitude of the Commission Sun points out the following statement made on page 14 of the Commission's brief in support of its application for certiorari in *Federal Power Commission* v. *Callery Properties, Inc.*, United States Supreme Court No. 756, Oct. 1964 Term: "* * * In our view, a producer who commences service * * * under a temporary certificate issued *ex parte*, should be permitted to collect and retain no higher price than that which he would have received under a properly conditioned permanent certificate. In short, he is entitled to no more than an 'in-line' price until such time as a just and reasonable rate is determined."

In its intervention Sun calls attention to a February 5, 1963, order of the Commission denying the motion of certain distribution companies, which were parties to the consolidated proceedings, either to vacate the unconditioned temporary certificates or to impose indefinite, floorless refund conditions. The theory of Sun is that the effect of this order, from which no appeal was taken, is to preclude the imposition of a refund obligation on a producer to which an unconditioned temporary certificate was issued and, hence, to establish that Sunray is not aggrieved. To determine this point we would have to consider the merits of the case, at least in part.

The contention of Sun emphasizes the difficult position in which the court has been put. We are asked to determine threshold questions which bear on the merits. Perhaps after hearing the merits we would be convinced that Sunray is not aggrieved, but we are not so convinced now. We well recognize the responsibility of the court to be satisfied as to its jurisdiction. We also recognize that in some cases a jurisdictional question is so intertwined with the merits [11] that ruling thereon should be deferred until a hearing of the merits.[12] Ofttimes in Federal Power Commission cases we have deferred the disposition of motions to dismiss until the hearing of the merits and no party has objected.[13] No such route is open

[11] See *Land* v. *Dollar*, 330 U.S. 731, 735.

[12] See *Fireman's Fund Ins. Co.* v. *Railway Express Agency*, 6 Cir., 253 F. 2d 780, 784, and 2 Moore, Federal Practice, ¶ 12.16, pp. 2274–2275 (2d ed.). See also Rule 12(d), F.R. Civ. P., which permits the deferring of certain defenses including lack of jurisdiction until the trial.

[13] This occurred in the group of cases reported under the style of *Texaco, Inc.* v. *Federal Power Commission*, 10 Cir., 317 F. 2d 796, reversed on other grounds 377 U.S. 33, rehearing denied 377 U.S. 984.

to us in the case at bar. The Commission has made it eminently clear that the petitions to review its Opinion 422 will not move forward until we make a definitive determination of its motion to dismiss. We have no real choice except to decide the motion now.

The District of Columbia Circuit has said that aggrievement within the meaning of § 19(b) "is a status conferred by Congress upon a party who * * * is likely to suffer injury" by an administrative determination,[14] and that "aggrievement must be present and immediate, or at least must be demonstrably a looming unavoidable threat."[15] Although these statements were made in cases where the petitioner was not a gas producer, we see no reason why they should not apply here. Sunray is likely to suffer injury because of the determination of the in-line price. The position of the Commission that a holder of an unconditioned temporary certificate is entitled to retain no more than an in-line price is an unavoidable threat that the Commission will require Sunray to make refunds. The situation is immediately pressing[16] because if Sunray does not question the initial price in this petition to review, it will be forever foreclosed from so doing. We hold that Sunray is an aggrieved party within the meaning of § 19(b).

The other grounds asserted in support of the motion to dismiss deserve little consideration. The Commission says that Sunray did not take exceptions to the examiner's decision. That decision came after Sunray had stopped production from the well serv-

[14] *City of Pittsburgh* v. *Federal Power Commission*, D.C. Cir., 237 F. 2d 741, 746.

[15] *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, D.C. Cir., 246 F. 2d 688, 694.

[16] *See Eccles* v. *Peoples Bank*, 333 U.S. 426, 432, rehearing denied, 333 U.S. 877.

icing the Tennessee contract and the examiner did not order refunds from those holding unconditioned temporary certificates. The result was that Sunray was not hurt. Sunray's aggrievement did not come until the Commission declined to follow the examiner on this recommendation. By its failure to except Sunray waived nothing. For a waiver to be effective it must be knowledgeable. Sunray had no knowledge that the Commission would upset the examiner on the refund issue.

Finally, the Commission says that the petition for rehearing of its Opinion 422 and order thereon, which under § 19(a) [17] is a condition precedent to court review, was insufficient because it was neither signed nor verified by anyone on behalf of Sunray.[18] If the signing and verification were technically insufficient, the Commission could have rejected the application because of violation of its rules and regulations. Instead it accepted the application for rehearing and acted thereon. In the circumstances the technical objection deserves no further comment.

The petition for leave to intervene is granted. The motion to dismiss is denied. In view of our action on the motion to dismiss, the motion for clarification is moot and, accordingly, denied.

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[17] 15 U.S.C. § 717r(a).

[18] The application for rehearing was filed by ten named producers and verified by the attorney for one of them.

APPENDIX C

I

United States of America, Federal Power Commission

AMERADA PETROLEUM CORPORATION, ET AL.,
DOCKET NOS. CI62–1544, ET AL.

Opinion No. 501

Opinion and Order Requiring Refunds

(Issued July 27, 1966)

Before Commissioners: LEE C. WHITE, *Chairman;* L. J. O'CONNOR, Jr., CHARLES R. ROSS, DAVID S. BLACK and CARL E. BAGGE

BLACK, *Commissioner:* This certificate proceeding under Section 7 of the Natural Gas Act (Act) originally involved 32 separate applications by 22 producers for initial sales of natural gas in Texas Railroad Commission District No. 4 to various pipelines for resale in interstate commerce for prices ranging from 15.944¢ per Mcf to 19.795¢ per Mcf. Temporary certificates at prices not exceeding 18¢ per Mcf were issued. Refund conditions, included in the temporary certificates in eight of the dockets, would require the producer to refund any amount collected in excess of the initial price set forth in the permanent certificate. In the remaining dockets no refund conditions were imposed in the certificates.

By our Opinion No. 422 issued March 23, 1964 and Opinion No. 422–A issued May 27, 1964 we granted permanent certificates of public convenience and

necessity to the applicants. Each of these certificates was conditioned upon an initial price of 16¢ per Mcf which we found to be the "in-line" price for Texas District No. 4 at the time of execution of the contracts. In those dockets where the producers had commenced delivery pursuant to temporary certificates containing refund conditions we ordered refunds to be made. In the remaining dockets, where no specific refund obligation was included in the temporary certificates, we deferred decision.[1]

The refund issue in this proceeding arose out of the decision of the Court of Appeals for the District of Columbia[2] on appeal from our decision in *Skelly Oil Company*.[3] In the *Skelly* case we had determined that producers operating under unconditioned certificates should not be required to make refunds of amounts collected in excess of the determined "in-line" price. The Court of Appeals, however, reversed our decision and remanded the case with instructions to make, with the assistance of the parties, "a broader and more penetrating analysis of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion." (329 F. 2d 242, 249). While petitions for certiorari were denied by the Supreme Court in the *Skelly* case, similar issues were again raised in petitions for certiorari filed in *United Gas Improvement Corp.* v. *Callery Properties Inc.*, 335 F.

[1] Paragraph (G) of the order accompanying Opinion No. 422.

[2] *P.S.C. of New York* v. *F.P.C.*, No. 17582, *et al.*, 329 F. 2d 242, (CADC 1964), cert. denied 377 U.S. 963, 1964.

[3] Opinion No. 362, issued August 30, 1962, 28 FPC 401, modified on rehearing by Opinion No. 362-A, 28 FPC 1065. Two dockets (Jake L. Hamon (Operator), *et al.*, No. CI61-922, and Jake L. Hamon, No. CI61-1745) were severed and settlement approved by order issued November 11, 1965. In three other dockets, no amounts were collected in excess of the "in-line" price.

2d 104 (CA5, 1964). After the Supreme Court granted certiorari in the *Callery Properties* case on March 8, 1965, our order of March 29, 1965, in this proceeding provided that "Since it now appears that the refund issue will be reviewed and clarified by the Supreme Court we conclude that no further action can be taken in this proceeding until after the Court has issued a decision in the *Callery* case." On December 7, 1965, the Supreme Court reversed the decision of the Circuit Court of Appeals in the *Callery* case. *United Gas Improvement Corp.* v. *Callery Properties,* —— U.S. ——. "It is now established that the Commission had both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price in the absence of a showing that it would be inequitable to require refunds of either all or part of the excess amounts collected." *Skelly Oil Company,* Opinion No. 492 (June 1, 1966).

In Opinion No. 422 in this proceeding we summarized the standard set by the Circuit Court of Appeals in the *Skelly* case as follows:

> The Court also has stated, however, that the existence of the power to order refunds at the time of permanent certifications does not mean that its exercise is mandatory. The standard to be followed is the standard of equity, and the decision as to whether refunds should be ordered is to turn on equitable considerations. The existence of a refund requirement is one such consideration but is not controlling; the public interest factors must also be weighed and may be adequate to offset the absence of an explicit condition. (Mimeo., p. 21.)

To permit a more detailed consideration of the equitable factors, the Commission deferred its decision on the refund issue to give the parties an opportunity to brief the issue in light of the Court's

opinion in the *Skelly* case. Briefs were filed by Texaco Inc., Standard Oil Company of Texas, (Sotex), George H. Coates, Lamar Hunt, Sun Oil Company, New York Public Service Commission, Pennsylvania Public Utility Commission, and by Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company, American Petrofina Company of Texas, Jake L. Hamon, and Humble Oil & Refining Company have adopted the brief filed by Texaco Inc. Reply briefs have been filed by Texaco Inc., Sun Oil Company, Clark Fuel Producing Company (Operator), *et al.*, and Jake L. Hamon. Motions for an evidentiary hearing on the question of refunds were filed by Texaco Inc., *et al.*, Sun Oil Company and Clark Fuel Producing Company.

The producers' briefs present arguments which fall into two general classifications: first, arguments directed to the Commission's authority to order refunds of amounts collected under unconditioned temporary authorizations; and, second, arguments dealing with the various equitable considerations. The cited cases have established the Commission's power to order refunds under these circumstances; the issue to be determined is whether it is equitable for us to do so.

The producer's major arguments on the equitable side may be summarized as follows:

(1) The ordering of refunds after issuing temporary certificates without refund conditions would result in entrapment, since the producers had every reason to be assured that no refunds would be required. Budgeting and planning have been carried out in reliance on the Commission's indicated policy of no refunds without refund conditions.

(2) Payments of state taxes and royalties, based

on the sales price of the gas, were made without protest or provision for recoupment in reasonable reliance upon the price in the unconditioned temporary certificates. The tax overpayments will have to be assumed as a loss; and the recovery of royalties will be a very difficult and in most instances, an impossible task.

(3) The doctrine of mutuality argues against ordering refunds. Amounts collected through excessive rates during the interim period of the temporaries are offset when the producers are required to sell their gas under conditions which prohibit rate increases and thus prevent producers from even collecting subject to refund what they consider a just and reasonable rate.

(4) The distributing companies failed to refund to consumers amounts received from pipeline suppliers pursuant to Commission refund orders, and refunds to them would be windfalls.

(5) There is a need to be able to rely on the Commission's orders. The basic financial stability of the producing industry requires that producers be assured that amounts collected under filed rates without refund condition may be retained and further invested in business operations. To make the provisions of temporary certificates subject to retroactive adjustment would create a serious restraint on the alienation of producing properties and adversely affect the future financing of industry drilling programs.

It is implicit in the opinion of the Supreme Court in the *Callery* case, as well as the opinion of the Court of Appeals in the *Skelly* case, that the fact that the producers reasonably and in good faith believed that they were entitled to collect their rates without being subject to a refund obligation is insuffi-

cient, by itself, to avoid the refund obligation. To the same effect are our decisions in *Skelly Oil Company*, Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492–A (July 21, 1966); *Hawkins & Hawkins*, Opinion No. 498, (July 22, 1966); *Turnbull & Zoch Drilling Co.*, Opinion No. 499, (July 25, 1966). Nor are the budgeting and planning activities of the producers, in reliance upon their right to retain the full rates collected, sufficient to prevent refunds being required, although special provisions for delayed repayment may be made if this is shown to be necessary. The burden of preparing revised tax returns would necessarily be present in each case, and is insufficient, without more, to avoid the refund obligation.

The argument that distributors have failed or may fail to pass refunds received by them on to the ultimate consumers is not a ground for defeating the refund obligation of the producers, although it may be a ground for requiring that refunds be placed in escrow or that the producer retain them, paying interest thereon, until suitable arrangements can be made to see that refunds are flowed through to the public, either in the form of direct refunds or of lower rates. *Skelly Oil Company*, Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492–A (July 21, 1966); *Hawkins & Hawkins*, Opinion No. 498 (July 22, 1966); *Turnbull & Zoch Drilling Co.*, Opinion No. 499 (July 25, 1966).

It would be inequitable, however, and contrary to the cited cases for this Commission to order producers to make refunds of amounts which have been paid out in taxes or in royalties in reasonable reliance upon a prior Commission order, and which amounts cannot now be recouped. It appears from prior cases that recovery of royalties so paid out would be so ex-

pensive as to be impractical. *Skelly Oil Company,* Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492–A (July 21, 1966); *Hawkins & Hawkins,* Opinion No. 498 (July 22, 1966). These cases also determined that refunds of state production taxes, paid out in reasonable reliance upon a Commission order, should not be ordered except to the extent such taxes are recoupable by credit or otherwise. In all these cases it was determined that from February 1, 1964, one week after the decision of the Court of Appeals in *Skelly* that refunds might be ordered under these circumstances, no producer was entitled as a matter of equity to assume that no refunds would be ordered. To these established principles we adhere.

Accordingly, the producers listed in Appendix A hereto will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates, with the exception of royalty and overriding royalty payments made prior to February 1, 1964, to the extent attributable to the excess amounts collected, and with the further exception of state production taxes paid prior to February 1, 1964, to the exent attributable to the excess amounts collected, and not now recoupable by credit or otherwise.

There appears to be no need for reopening the proceedings to permit the introduction of additional evidence. The statements of the producers in their briefs have been accepted at face value for the purposes of this proceeding. The motions to reopen the proceedings will be denied.

The Commission orders:

(A) As a condition of the certificate granted in each of the dockets listed in Appendix A hereto, each certificate holder shall file within 60 days of the effec-

tive date of this order a report of the amounts collected by said certificate holder in excess of 16 cents per Mcf at 14.65 psia, less any amounts specified in ordering paragraphs (B), and (C). Interest to the date of this order shall be added at the rate of 6 percent per annum on all such excess amounts collected prior to March 1, 1960, and at the rate of 7 percent per annum on all such excess amounts collected on or after March 1, 1960, except that no interest shall be included on refunds to the extent state production taxes, paid but recoupable, are included in such refunds, and interest shall not exceed the legal rate recoverable by the certificate holder on that portion of the amount of any refund which was in fact paid over by certificate holder, not for his own benefit, to any third party prior to February 1, 1964.

(B) Each certificate holder listed in Appendix A hereto, may omit from the reports required by ordering paragraph (A) any amount by which payments made before February 1, 1964, of royalties and overriding royalties were increased by reason of the difference between the price of 16 cents per Mcf and the rates actually collected, and any amounts by which payments made before February 1, 1964, of state production taxes, not recoupable by credit or in any other manner, were increased by reason of said difference.

(C) The reports required by ordering paragraph (A) shall not include excess rates collected during any period when an increased rate in the docket in question was subject to possible refund in proceedings pursuant to Section 4(e) of the Natural Gas Act.

(D) Notwithstanding any other provision of this order, any state production taxes paid prior to February 1, 1964 by any party listed in Appendix A hereto, shall be required to be subject to the provisions of ordering paragraph (H) and the interest pay-

ments required thereby only from the time and to the extent that such excess tax payments may be recouped by credit or otherwise.

(E) Each report required by ordering paragraph (A) shall set forth the amount of refund related to each subject rate schedule (showing separately the principal and applicable interest, with the reasons for differing rates of interest on different portions of the principal), the basis used for such determination, the period covered and a letter from the purchaser of the gas agreeing to the correctness of the amounts.

(F) Copies of all filings made pursuant to ordering paragraph (A) hereof shall be served at the time of filing upon all participants who within 45 days of the issuance of this order shall so request in writing, and upon the purchaser of the gas.

(G) Each certificate holder listed in Appendix A hereto shall retain the amounts shown in the reports required under ordering paragraph (A) subject to further order of the Commission directing the disposition of those amounts. If any such certificate holder elects to commingle these retained refunds with its general assets and use them for its corporate purposes, it shall pay interest thereon at the rate of 5¾ percent per annum on all funds thus available from the date of the filing of the refund report to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final order of the Commission. If the certificate holder elects to deposit the retained refunds in a special escrow account, the certificate holder shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement, conditioned as set out below accompanied by certificate showing service of a copy thereof upon each of its jurisdictional customers. Unless notified to the contrary by the Secretary with-

in 30 days from the date of filing thereof, the Escrow Agreement shall be entered into between the certificate holder and any bank or trust company used as a depositor for funds of the United States Government and the agreement shall be conditioned as follows:

(1) Certificate holder, the bank or trust company, and the successors and assigns of each, shall be held and formally bound unto the Federal Power Commission for the use and benefit of those entitled thereto, with respect to all amounts and the interest thereon deposited in a special escrow account, subject to such Agreement, and such bank or trust company shall be bound to pay over to such person or persons as may be identified and designated by final order of the Commission and in such manner as may be therein specified, all or any portion of such deposits and the interest thereon.

(2) The bank or trust company may invest and reinvest such deposits in any short-term indebtedness of the United States or an agency thereof or in any form of obligation guaranteed by the United States which is, respectively, payable within 120 days as the said bank or trust company in the exercise of its sound discretion may select.

(3) Such bank or trust company shall be liable only for such interest as the invested funds described in paragraph (2) above will earn and no other interest may be collected from it.

(4) Such bank or trust company shall be entitled to such compensation as is fair, reasonable and customary for its services as such, which compensation shall be paid out of the escrow account to such bank or trust company. Said bank or trust company shall likewise be entitled to reimbursement for its reasonable expenses necessarily incurred in the administra-

tion of this escrow account, which reimbursement shall be made out of the escrow account.

(5) Such bank or trust company shall report to the Secretary of this Commission quarterly, certifying the amount deposited in the trust account for the quarterly period.

(H) Any certificate holder may apply to the Commission, within 15 days of any order directing payment of any or all amounts held by any certificate holder pursuant to ordering paragraph (G), for leave to make payments over a period of time in discharge of its refund obligation.

(I) The motions for a hearing for this presentation of evidence are hereby denied.

By the Commission. Commissioner O'Connor dissents for the reasons expressed in his dissents in Skelly Oil Company, *et al.*, Opinion No. 492 (June 1, 1966), and H. L. Hawkins & H. L. Hawkins Jr., (Operator), *et al.*, Opinion No. 498 (July 22, 1966).

(SEAL) JOSEPH H. GUTRIDE,
Secretary.

	Docket Nos.
American Petrofina Company of Texas	CI61-1418
Cherosage Enterprises Inc., *et al.* (Now: Patchin-Wilmoth Industries Inc., *et al.*)	CI62-1459
Clark Fuel Producing Company (Operator), *et al*	CI61-1279
Coates, George H	CI62-355
Cox, Edwin L	CI62-621
H. H. Phillips, Jr., *et al*	CI62-954
Hudson, W. H. (Operator), *et al*	CI62-1074
Humble Oil & Refining Company	CI62-704
Hunt, Lamar	CI61-730
Sohio Petroleum Company (Operator), *et al.* (formerly Katz Oil Company (Operator), *et al.*)	CI61-627
McWood Corporation	CI61-839
McWood Corporation	CI62-706
Monsanto Company	CI61-876
Standard Oil Company of Texas (Division of California Oil Company)	CI61-1377

	Docket Nos.
Standard Oil Company of Texas (Division of California Oil Company)	CI62–1140
Sun Oil Company	CI61–857
Sun Oil Company	CI61–1101
Sun Oil Company	CI61–1584
Sun Oil Company	CI61–956
Sunray Mid-Continent Oil Company (Name changed to Sunray DX Oil Co.)	CI61–1103
Texaco Inc.	CI61–961
Texaco Inc.	CI61–1757

II

United States of America, Federal Power Commission

Amerada Petroleum Corporation, et al., Docket Nos. CI62–1544, et al.

Opinion No. 501–A

Memorandum Opinion and Order Confirming Order Requiring Refunds and Denying Motions for Stay

(Issued December 6, 1966)

Before Commissioners: Lee C. White, *Chairman;* L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

On July 27, 1966, the Commission issued Opinion No. 501 and its accompanying order in this proceeding, requiring refunds by certain natural gas producers of a part of the amounts collected by them in excess of the 16 cents per Mcf later determined to be the proper initial rate. Because these excess amounts were collected while operating under temporary certificates without express refund conditions, and because a balancing of the equities indicated that refunds in full should not be ordered, no refunds were required of certain excess amounts collected but later disbursed in production tax payments which cannot

be recouped or in royalty payments. Applications for rehearing have been filed by Texaco, Inc. (Texaco), Sunray DX Oil Company (Sunray), Standard Oil Company of Texas, a division of Chevron Oil Company (Sotex), Edwin L. Cox (Cox), Clark Fuel Producing Company (Operator), *et al.* (Clark), George H. Coates (Coates), Humble Oil & Refining Company (Humble), Sohio Petroleum Company (Sohio), Lamar Hunt (Hunt), American Petrofina Company of Texas (Petrofina), Patchin-Wilmoth Industries, Inc. (Patchin-Wilmoth), and Sun Oil Company (Sun). Motions for stay of the ordering clauses of Opinion No. 501 were made by a majority of the applicants. By order issued September 2, 1966, we granted rehearing for the purpose of reconsideration.

In general, the applications for rehearing reiterated arguments previously considered and rejected by this Commission in Opinion No. 501 and in *Skelly Oil Company, et al.*, Opinions Nos. 492 and 492–A (1966), and *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, Opinions Nos. 498 and 498–A (1966). We have found nothing in the applications for rehearing which would cause us to alter our prior determinations. Certain statements in these applications, however, deserve comment.

Hunt alleges "The Commission erred in concluding that Hunt had notice of a potential refund obligation subsequent to February 1, 1964." (Hunt application, page 9.) This argument was dealt with in *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, Opinion No. 498–A:

> Some of the applicants argue that refund of excess amounts collected but later paid out in royalties should not be required even after February 1, 1964. We held that on that date producers should be considered to have knowledge that refunds might be required by reason of

> the doctrine declared by the Court of Appeals for the District of Columbia in *PSC of the State of New York* v. *F.P.C.*, 329 F. 2d 242, issued January 23, 1964. As a legal matter the producers, like any other persons, might be charged with knowledge of what the law was, even prior to the time that it was first declared by a court and even though the Commission had previously held a different view. As a matter of equity, however, we think that the producers should not be charged with the knowledge of the law as declared by the Court of Appeals prior to the time of that court's decision. From the time this view of the law was enunciated by the court, every producer either knew or should have known that refunds might be required of excess amounts collected under temporary certificates, even though these certificates contained no explicit refund conditions. (Pages 3–4.)

Sotex and Clark object to the equities in the present case being determined by the Commission on the basis of Opinions Nos. 492, 492–A, 498 and 499, to which Sotex and Clark were not parties. (Sotex application, page 7; Clark application, page 6). Neither Sotex nor Clark nor any other applicant in this proceeding is being held responsible for refunds on the basis of facts established in other proceedings. These applicants have had full opportunity to set forth any facts and any evidence which they wished to present with respect to their particular circumstances in this proceeding. Clark and Sotex have alleged no facts which would serve to differentiate their cases from those cited by us. These cases were cited as established precedents applicable to the present proceeding, and not as establishing the facts in this proceeding.

Several applicants contend that they were improperly deprived of an opportunity to present evidence

on the nature of their budgeting and planning activities "and how disastrous the ordering of refunds will be on such activities." (Texaco application, page 3; Humble application, page 5.) According to figures submitted by the two companies, the total refund exposure of Humble in this proceeding in under $25,000 and the total refund exposure of Texaco is under $1,500. No serious arguments can be made that refunds of these amounts would seriously disrupt the fiscal activities of corporations such as Humble and Texaco. The broader arguments made by others that such "retroactive rate making" will have detrimental effect on the industry's ability to plan, budget and finance future drilling (Sunray application, page 3) or upon the financial stability of producers (Cox, page 4) have been fully considered by the Commission and found to be without merit.

Patchin-Wilmoth states that it has built three miles of pipeline with a metering station and compression plant at a total cost of $33,943.56 for the purpose of delivering the gas to the pipeline purchaser. Five cents per Mcf of the 18 cents per Mcf contract price was allotted to it by the other working interest owners as reimbursement for the building of the facilities. After recovery of the cost of construction 3.5 cents was allotted as compensation for maintenance of the pipeline, metering station and compression plant. Pursuant to Opinion No. 422, which directed an initial price of 16 cents per Mcf, the total price to seller was reduced to 16 cents. Thereafter, in March 1966, the gas field became nonproductive, causing Patchin-Wilmoth to sustain substantial loss both in the drilling and equipping of its wells and the construction of the delivery facilities.

A loss sustained on an individual producing property is not ground for refusal to order refunds. The initial price to which seller was entitled has previously

been determined in this proceeding (Opinion No. 422), and we think that this price should be the measure of the refunds to be required here.

No substantial reason has been advanced why stay should be had of the ordering paragraphs of Opinion No. 501. Those paragraphs did not provide that refunds should be made; they provided only that the amounts of such refunds should be computed and that these amounts should be placed in escrow or retained by the producers pending further order of the Commission. In the event the in-line price is modified by court order, this will be taken into account in a later order disposing of the refund amounts.

The Commission finds:

(1) The assignments of error and applications for rehearing filed in this proceeding present no new facts or legal principles which would warrant any change in, or modification of, the Commission's Opinion No. 501 in this proceeding issued July 27, 1966.

(2) No good cause exists for granting the motions for stay of the ordering paragraphs of said Opinion No. 501.

The Commission orders:

(A) Opinion No. 501 and its accompanying order, issued July 27, 1966, are in all respects confirmed.

(B) The relief requested on rehearing in the applications for rehearing filed in this proceeding is hereby denied.

(C) The motions for stay of the ordering paragraphs of Opinion No. 501 are denied.

By the Commission. Commissioner O'Connor dissenting filed a separate statement appended hereto. Commissioner Carver not participating.

(SEAL) JOSEPH H. GUTRIDE,
Secretary.

AMERADA PETROLEUM CORPORATION ET AL., DOCKET NOS. CI62–1544 ET AL. (OPINION NO. 501–A)

(Issued December 6, 1966)

O'CONNOR, *Commissioner*, dissenting: In accordance with my dissent from the majority opinion in Opinion No. 501, I would grant the relief requested in the applications for rehearing. In addition, I would add further comments with regard to Patchin-Wilmoth Industries, Inc., *et al.* (Successor to Cherosage Enterprises, Inc.) (Patchin-Wilmoth).

On April 10, 1962, Patchin-Wilmoth entered into a gas sale contract with Natural Gas Pipeline Company of America (Natural) wherein Patchin-Wilmoth agreed to sell gas to Natural at a fixed price of 18.00 cents per Mcf without escalations for a period of 20 years. To make this sale, Patchin-Wilmoth constructed three miles of lateral line for delivery to Natural's main line as well as a metering station and compression plant. These facilities cost approximately $33,943.00.

On March 23, 1964, the Commission issued Opinion No. 422, *Amerada Petroleum Corporation et al.*, Docket Nos. CI62–1544 *et al.* which set an initial price of 16.00 cents per Mcf for the gas in Patchin-Wilmoth's production area. In compliance therewith, the 18.00 cents price paid by Natural was reduced to 16.00 cents. Two years later, in March 1966, Patchin-Wilmoth's gas field became non-productive.

Total refunds owed by Patchin-Wilmoth are estimated to be $2,750.00. Furthermore, Patchin-Wilmoth has no other certificates on file with the Commission nor does it appear that it owns a working interest in any other properties for which rate schedules are on file with this Commission. During the period of production, revenues fell far short of

costs and as a result, the company has suffered a substantial loss. Therefore, in light of the minimal refunds involved; the construction of delivery facilities by the seller; the fact that production has ceased; the limited amount of gas that was recovered; and, the substantial loss on investment, the majority, by ordering refunds, has shown an utter disregard of the equities involved and accordingly I dissent.

LAWRENCE J. O'CONNOR, JR.,
Commissioner.

APPENDIX D

JUDGMENT

Nineteenth Day, November Term, Friday, December 9th, 1966

Before Honorable JEAN S. BREITENSTEIN, Honorable DELMAS C. HILL and Honorable OLIVER SETH, *Circuit Judges*

These causes came on to be heard on petitions to review orders of the Federal Power Commission and motions to adduce additional evidence and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the motions to adduce additional evidence are severally denied, and the causes remanded for further proceedings consistent with the opinion of the court.

By order of January 7, 1967, the mandate of the United States Court of Appeals was stayed to February 13, 1967.

By order of February 10, 1967, the mandate of the United States Court of Appeals was stayed to March 6, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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IN THE

Supreme Court of the United States

October Term, ~~1966~~ 67

No. ~~1184~~ 61

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY, and UNION PRODUCING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY, AND UNION PRODUCING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, The United Gas Improvement Company, prays that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Tenth Circuit on December 9, 1966, which reversed certain orders of the Federal Power Commission.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit is not yet reported. It is reprinted as Appendix B hereto, *infra*, pages 1a-30a. The opinions and orders of the Federal Power Commission which were reviewed by the Court of Appeals are reported at 31 FPC 623 and 31 FPC 1315 (1964) and are reprinted in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General of the United States (R. 354-96, 409-18).

JURISDICTION.

The judgments of the Court of Appeals for the Tenth Circuit were entered on December 9, 1966, *infra*, page 31a. Jursidiction of this Court is invoked under 28 U. S. C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

QUESTIONS PRESENTED.

This case involves certificate applications by independent producers under § 7(c) of the Natural Gas Act. The issues now before this Court arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers in Texas Railroad District No. 4, the area involved in this case, at the very high prices contained in the producer-pipeline contracts. After the statutory hearing the Commission erroneously relied on these unregulated price levels in *ex parte* temporary certificates and other *ex parte* action to escalate the price level for the area required by the public convenience and necessity under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*Catco*), from the 15¢ per Mcf it had established in an earlier proceeding to 16¢ per Mcf. However, it did undertake pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court to determine whether refund of excesses above the lawful price, collected pursuant to *ex parte* temporary certificates, was required in order to afford the consumer a complete bond of protection. On appeal by consumer representatives the Court of Appeals below affirmed the escalation of the "in-line" level. On cross appeal by producers the Court held that the Commission lacked all power to order refund of unlawful excesses. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund amounts collected pursuant to *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Did the Commission err in relying on temporarily certificated prices and other *ex parte* action to permit an escalation in the price level for District 4 above the level earlier found to be in-line with other properly certificated sales in the area?

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) & (e) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended*, 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:

* * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements

of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

• • •

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT OF THE CASE.

This case presents important questions of the proper exercise of the Federal Power Commission's authority to issue certificates of public convenience and necessity under § 7 of the Natural Gas Act. The particular issue raised by this Petition is the Commission's power to condition the issuance of permanent certificates under § 7 upon the refund by producers of excess amounts collected pursuant to *ex parte* temporary certificates during the period while producer and consumer interests were litigating the question of the appropriate initial price level before the Commission. Two courts of appeals have reached directly opposite conclusions as to the power of the Commission under § 7 to order such refunds, thereby making the issue one of particular importance and urgency.

Sunray DX Oil Company and the eight other producer-respondents here entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producer-respondents applied for temporary certificates. These applications were made pursuant to that part of § 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ." Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers. Rather, such applications allege the possibility of economic problems for the individual producer itself,

such as drainage by adjoining owners, necessity to flare gas or even simply loss of profits.[1]

While not using the word "refund," all the temporary certificates issued to the producers here involved contained the following or a similar provision:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (R. 190, 192, 194, 196)

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant (R. 189-90). No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including The United Gas Improvement Company [2] and the Public Service Commission of the State

1. The implication of all such allegations is that if the producer did not receive the privilege of the *ex parte* temporary certification he would suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege and *any* benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy.

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon refund of amounts already collected in excess of the legal conditioned rate level.

The first Commission decision to pass upon this issue was one involving new sales in Texas Railroad District No. 4. *Skelly Oil Company,* 28 FPC 401, 1065 (1962). In *Skelly* the Commission held that although it might have power to order refunds in some cases, it was inequitable to do so in the case before it because the temporary certificates issued to the producers there involved did not contain the express term "refund" and therefore gave the producer no warning of potential liability.[3]

This aspect of the decision was appealed to the Court of Appeals for the District of Columbia Circuit by the New York Public Service Commission, The United Gas Improvement Company and Long Island Lighting Company.[4] The Court of Appeals reversed as to this aspect, holding that the mere absence of an express refund condition in a temporary certificate was not a sufficient equitable consideration to justify the denial of consumer protective refunds. *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir.

3. In the case of certificates which did contain the word "refund," the Commission ordered refunds without further consideration of equities.

4. Several producers also appealed the aspect of the Commission order which reduced the rates they were collecting under temporary certificates from 16¢ per Mcf to 15¢ per Mcf to be thereafter collected under permanent certification. This aspect of the Commission's decision was affirmed on appeal. *Public Service Comm'n v. FPC, supra* at 345-48.

1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963. It remanded for further proceedings, as the result of which the Commission ultimately ordered substantial refunds. *Skelly Oil Co.*, Opinion 492, issued June 1, 1966 (unreported).[5]

In the meantime there was a significant development on a related front. As a result of the pressures generated by the above litigation, the Commission took the step of making a file of *ex parte* letter certificate orders available in its public reference room (however, it still published no notice of these). By special daily investigation the New York Public Service Commission discovered certain out-of-line certificates (involving South Louisiana sales) in this file within thirty days of their issuance and appealed these *ex parte* orders also to the Court of Appeals for the District of Columbia Circuit. These letter orders were issued under the lead docket of *McDermott*. The *Skelly* appeal was pending at the same time and thus the District of Columbia Circuit was presented with all aspects of the regulatory problem of *ex parte* temporary certificates. *McDermott* and *Skelly* were heard by the same panel within a month of each other and the decisions in the two were handed down within the same month. Each must necessarily be read in the light of the other. The Court held in *McDermott* that the Commission had power to issue temporary certificates to producers, even at "out-of-line" prices, but only if such *ex parte* action was subject to complete review and adjustment at the time of permanent certification after hearing. *Public Service Comm'n v. FPC*, 327 F. 2d 893 (D. C. Cir. 1964). Then, in *Skelly*, the Court held that out-of-line temporary certificates were subject to adjustment by the ordering of refunds. *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963.

5. Producers have appealed this decision to the Tenth Circuit, further complicating the legal picture. *Skelly Oil Co. v. FPC*, CA 10 No. 9000 *et al.*

A final element completes the legal background of the present case. When the Commission in 1960 abandoned individual producer rate regulation and adopted an area approach, see *Wisconsin v. FPC,* 373 U. S. 294, it issued a Statement of General Policy setting forth, *inter alia,* certain so-called "guide-line" price levels for initial prices in various areas. Statement of General Policy, No. 61-1, 24 FPC 818, issued September 28, 1960. This Statement was issued without notice or hearing and was not subject to court review. *Wisconsin v. FPC,* 292 F. 2d 753 (D. C. Cir. 1961). Considerable litigation has been devoted since to the question of whether such a Statement can be given any "substantive" weight.

It did have a direct impact on the present proceeding. In the *Skelly* decision discussed above the Commission confined its 15¢ per Mcf price finding to a period prior to September 28, 1960. It severed out from *Skelly* four dockets involving contracts dated after the Statement and consolidated them with other certificate applications involving contracts also dated after that time (R. 197-202) to create the proceeding here under review. Petitioner and other consumer representatives intervened and the case was heard on the merits.

The Presiding Examiner's decision was issued on July 23, 1963 (R. 285-341). The Examiner, on the basis of the Commission's *Skelly* precedent (then not yet reversed by the Court of Appeals), refused to impose refunds of excesses collected under temporary certificates even though he found the temporary rates were unlawful. Petitioner and other intervenors excepted to this decision. On January 24, 1964, the Court of Appeals for the District of Columbia handed down the *Skelly* decision and on March 23, 1964, the Commission issued its Opinion 422 in the present proceeding (R. 354-96). The Commission reversed the Examiner's refusal to order refunds and, relying on the Court of Appeals' *Skelly* decision, severed out and

deferred decision on this refund issue pending the filing of briefs and possible evidence.[6]

Various producers appealed this refund ruling to the Court of Appeals for the Tenth Circuit which on December 8, 1966, reversed and held that:

> "[R]efunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition." (23a)

Thus the case raises a clear conflict between circuits.

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6. In this opinion the Commission also found, contrary to the contention of Petitioner and other intervenors, that the "line" for initial prices had risen from the 15¢ per Mcf found in the *Skelly* proceeding for the period before 1960, to 16¢ per Mcf for the period after. The Court of Appeals below affirmed this finding of a change in the line. Petitioner believes the decision of the Commission and the Court to be erroneous as a matter of law. *Public Service Comm'n v. FPC*, CADC No. 19796 *et al.*, decided Feb. 7, 1967 (reversing an identical escalation in the in-line level in Districts 2 and 3). As to this point it relies on the Petition for a Writ of Certiorari of the New York Public Service Commission *et al.* which challenges the court below on this point.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decision of the Court of Appeals for the District of Columbia Circuit Thereby Creating Serious Public and Administrative Confusion Since Subsequent Appeals Could Be Taken to Either Court.

The decision below is in direct conflict with the decision of the District of Columbia Circuit in *Public Service Comm'n. v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963 ("*Skelly*"). In the *Skelly* case the Court of Appeals for the District of Columbia Circuit held that the Commission had statutory power to order refunds of unlawful amounts collected pursuant to temporary certificates even though such temporary certificates do not specifically impose a refund obligation. The court in *Skelly* summarized the issue as follows:

> "Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory power." 329 F. 2d at 248.

Having stated the issue thus the court ultimately concluded:

> "As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed." 329 F. 2d at 250.[7]

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7. In a footnote to the conclusion just quoted the court in *Skelly* states: "To the extent that our decision may be inconsistent with . . . [Sunray Mid-Continent Oil Co. v. FPC, 270 F. 2d 404 (10th Cir. 1954)] we are constrained respectfully to disagree with the latter." It is this same *Sunray* case of which the Court below said: "Such was our holding in Sunray Mid-Continent and we adhere to it." (23a)

The Court of Appeals in the case at bar concluded by holding exactly contrary to the decision of the District of Columbia Circuit above, stating as follows:

> "In our opinion, absent the special considerations recognized in Callery, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by acceptance of a temporary certificate containing an express refund condition." (23a)

The *Skelly* case cannot be distinguished from the case at bar. *Skelly* involved temporary certificates issued before the Commission's Statement of General Policy, No. 61-1, 24 FPC 818 (1960), whereas here the temporary certificates had been issued after the date of the Policy Statement. However, that Policy Statement was issued without notice or hearing and has been expressly held not to create any substantive rights. *Wisconsin v. FPC*, 292 F. 2d 753 (D. C. Cir. 1961). Moreover, reading of the opinion of the court below shows clearly that its basis for finding a total lack of refund power in the Commission, as opposed to some improper exercise of such power, are all applicable alike to temporary certificates issued before or after the Policy Statement.

The very serious danger of confusion inherent in this clear conflict of holdings is graphically demonstrated by the *Skelly* case itself. There the Commission at first refused to order refunds, claiming lack of statutory power. A distributor appeal to the District of Columbia Circuit resulted in the decision quoted above and a remand to the Commission. After some delay, the Commission eventually ordered refunds. *Skelly Oil Co.*, Opinion 492, issued June 1, 1966 (unreported). Producers then appealed to the Tenth Circuit, where the case has been briefed and is presently pending. *Skelly Oil v. FPC*, CA 10, No. 9000 *et al.* If it follows its precedent under review here, the Tenth Circuit will be obliged to reverse and remand the

case once again to the Commission. If the Commission should then deny refunds, distributor interests would theoretically be entitled to appeal to the District of Columbia Circuit and obtain still another reversal under the precedent there, and so forth.[8] The same sequence could in fact occur in the present case or in any of the many cases in which this issue is presently pending.[9]

Thus the conflict present here between two circuits is much more serious than one involving a legal precedent governing the local district courts of the given circuit. The district court is obliged to follow only the law of its circuit. Here, however, an appeal under § 19 of the Natural Gas Act may find its way to any circuit, particularly the Tenth Circuit or the District of Columbia Circuit. The Commission is equally obliged by law to follow a final order of either circuit. When these are in such direct conflict as in the present case the Commission is rendered helpless to act one way or the other. Such an intolerable situation must be corrected by this Court.

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8. Or, if the doctrine of law of the case came into play it could lead to an anomalous situation in which the Commission would be obliged to *reject* refunds in those cases where it found they should be ordered, so that a distributor's appeal to the D. C. Circuit would establish the proper law of the case. Such circuity and delay were clearly not the purpose of the Natural Gas Act.

9. The Commission has ordered refunds in the following cases: *Skelly Oil Co.*, Opinion 492, issued June 1, 1966, *appeal pending sub nom. Skelly Oil Co. v. FPC*, CA 10, No. 9000 *et al.*, (Texas District 4); *Hawkins & Hawkins*, Opinion 498, issued July 22, 1966, *appeal pending sub nom. Skelly Oil Co. v. FPC*, CA 10, No. 9220 (Texas District 3); *Amerada Petroleum Corp.*, Opinion 501, issued July 27, 1966, *appeal pending sub nom. Sunray DX Oil Co. v. FPC*, CA 10, No. 9227 *et al.*, (Texas District 4); *Sun Oil Co.*, Opinion 502, issued July 25, 1966, *appeal pending sub nom. Humble Oil & Refining Co. v. FPC*, CA 5, No. 24414 (Mississippi). The refund issue has also been raised, but not as yet appealed to the courts in major proceedings involving Southern Louisiana and recent sales in Texas District 4. See *Turnbull & Zoch Drilling Co.*, Opinion 499, issued July 25, 1966.

2. The Decision Below Conflicts With This Court's Decision in *United Gas Improvement Co. v. Callery Properties*, as to the Scope of the FPC's Refund Power Under § 7 of the Natural Gas Act.

United Gas Improvement Co. v. Callery Properties, 382 U. S. 223, was a recent major consideration by this Court of the Commission's powers under § 7 of the Natural Gas Act. The Court was unanimous in holding that:

> "The Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U. S. at 229.

The general legal proposition underlying this conclusion was the Court's holding that:

> "An agency, like a court, can undo what is wrongfully done by virtue of its order." *Ibid.*

In the present case the "wrong" done by virtue of the Commission's "order" was the permitting of sales of gas in interstate commerce at illegally high rates which would be passed along to the consumer pending a hearing on whether the public interest in fact required such sales or such high rates.

Callery is of course technically distinguishable from the present case in that it involved permanent certificates issued after hearing from which a timely appeal was taken with an ultimate reversal. In the present case temporary certificates were issued without notice or hearing, but in every case, as soon as notice was issued, consumer representatives intervened and contested the certificates until ultimately the Commission reversed its earlier *ex parte* orders and issued permanent certificates at lower rates. In both cases the governing legal principles are the same—

the rectifying of orders issued to producers by the Commission under erroneous principles of law which never became final but were ultimately corrected by the Commission. Clearly the stringent technical narrowing of the *Callery* holding by the court below to the precise procedural posture of the *Callery* proceeding is a decision which runs against the policy of the Act. That policy has been frequently declared by this Court to be the creation of a complete, permanent and effective bond of protection for the consumer. Therefore, certiorari should be granted to eliminate an erroneous and unwarranted vitiation of this Court's holding in *Callery*.

CONCLUSION.

For the foregoing reasons it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 8, 1967

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

Nos. 7781, 8298, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 8358, 8359, 8360 and 8362.
NOVEMBER TERM, 1966.

SUNRAY DX OIL COMPANY; SOHIO PETROLEUM COMPANY; THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY; THE BROOKLYN UNION GAS COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; LONG ISLAND LIGHTING COMPANY; TEXACO INC.; GULF OIL CORPORATION; SUN OIL COMPANY; EDWIN L. COX; LAMAR HUNT; HUMBLE OIL & REFINING COMPANY; AND UNION PRODUCING COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

GULF OIL CORPORATION; HUMBLE OIL & REFINING COMPANY; TEXACO INC.; AND SUN OIL COMPANY,

Intervenors in Nos. 8311, 8312, 8313, and 8314.

OPINION

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

because of the complex and time-consuming processes incidental to the establishment of a just and reasonable rate.[18] The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.

The Commission has recognized that the in-line price must reflect current conditions.[19] The Courts of Appeals have agreed.[20] Further support is found in the Callery decision where the Supreme Court referred to "other contemporaneous certificates" and "prices higher than existing levels."[21] We concur with the Commission that once the in-line price is established it is presumed to continue not until the just and reasonable rate is determined but until "substantial evidence is presented that it has changed."[22]

Thus we reach the heart of the Commission's decision. The question is whether substantial evidence sustains the 16-cent price. All the petitioners say that it does not.

The basis for the Commission's action is Staff Exhibit No. 16 which lists the provisions of gas sales in District No. 4 "dated 1955 and later with total rate of 14.0¢ Mcf and higher as accepted for filing by the Federal Power Commission as of 8-31-62." The Commission analyzed the figures presented and compared the initial contract

18. The Permian Basin Area Rate case was before the Commission for nearly five years. See supra note 6.

19. See Opinion No. 362, Skelly Oil Company, 28 FPC 401, 408; Opinion No. 412, Hassie Hunt Trust, 30 FPC 1438, 1442; Opinion No. 436, Union Texas Petroleum, 32 FPC 254, 260.

20. In United Gas Improvement Co. v. Federal Power Commission, 9 Cir., 283 F. 2d 817, 824, certiorari denied sub nom. Superior Oil Co. v. United Gas Improvement Co., 365 U. S. 879, the Court said: "As previously indicated the price line is intended to reflect current conditions in the industry." See also Sohio Petroleum Company v. Federal Power Commission, 10 Cir., 298 F. 2d 465, 467; and Atlantic Refining Company v. Federal Power Commission, D. C. Cir., 316 F. 2d 677, 680.

21. 382 U. S. 223, 227.

22. Superior Oil Co., Opinion No. 437, 32 FPC 241, 243.

prices for the two years here under consideration with those pertinent to the Skelly proceeding where the 15-cent price was fixed for sales contracted before the date of the Policy Statement. It found that in the later period 82% of the gas moving in interstate commerce was at initial contract prices of 16 cents per Mcf and higher, and that the weighted average price for the period was 17.176 cents per Mcf. For the earlier period the weighted average was 16.5 cents. This shows an increase of more than six-tenths of a cent for the later period. The Commission pointed out that the lowest selling price for substantial quantities of gas during the period in question was 16 cents and concluded that the public convenience and necessity required the issuance of the certificates at that price.

The distributors argue that the Commission considered and acted on suspect prices. United Gas Improvement Co. v. Federal Power Commission, 9 Cir., 283 F. 2d 817, 824, holds that it is an abuse of discretion for the Commission, in establishing a price line, to rely upon producer prices which are under review in pending court and Commission proceedings. In that case and the decisions of the Courts of Appeals which followed it[23] there were both numerous uncontested contracts available for consideration and certificates which the courts had rejected because of their issuance at excessive price levels.

The Examiner limited his consideration to sales under contracts which were made during the pertinent period and for which permanent certificates had been issued. The Commission found that the effect of this limitation was

23. See United Gas Improvement Co. v. Federal Power Commission, 5 Cir., 290 F. 2d 147, certiorari denied sub nom. Superior Oil Co. v. United Gas Improvement Co., 366 U. S. 965; Public Service Commission of New York v. Federal Power Commission, D. C. Cir., 287 F. 2d 146, certiorari denied sub nom. Hope Natural Gas Co. v. Public Service Commission of New York, 365 U. S. 880; United Gas Improvement Company v. Federal Power Commission, 10 Cir., 287 F. 2d 159; and California Oil Co., Western Div. v. Federal Power Commission, 10 Cir., 315 F. 2d 652.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

These petitions seek review of Opinion No. 422[1] of the Federal Power Commission granting permanent certificates of public convenience and necessity under § 7 of the Natural Gas Act[2] for sales of natural gas produced in Texas Railroad District No. 4 to various interstate pipeline companies. Nine of the petitions are by independent natural gas producers, three are by distributing companies selling gas in the Atlantic Seaboard area, and one is by the Public Service Commission of the State of New York. All of the petitions are brought under § 19(b) of the Act.

The Commission fixed the rate at 16 cents per Mcf. The producers say that the rate is too low and the distributors say that it is too high. The parties are also at odds on the Commission treatment of the refund question. We affirm the 16-cent rate and hold that refunds of collections made in excess of that rate under temporary certificates containing no express refund condition may not be ordered.

The first petition for review was filed in the Tenth Circuit by Sunray DX Oil Company and other producers. After procedural skirmishes,[3] petitions for review of Opinion No. 422 pending in other circuits were transferred to the Tenth Circuit pursuant to 28 U. S. C. § 2112(a). The producers filed motions for leave to adduce additional evidence. These motions were deferred to the hearing of the petitions on the merits. The proceedings were held in abeyance for a time in anticipation of the decision in United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223.

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1. 31 FPC 623.

2. 15 U. S. C. §§ 717-717w.

3. See Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 338 F.2d 808, and Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 351 F. 2d 395.

An understanding of the issues will be helped by a brief recitation of the Commission actions and the court decisions which make up the background. The decision in Atlantic Refining Co. v. Public Service Commission of New York, 360 U. S. 378, (CATCO) directed the Commission in certificate cases to keep initial prices in line. Thereafter, on September 28, 1960, the Commission promulgated its Statement of General Policy No. 61-1.[4] This was issued concurrently with Opinion No. 338 in Phillips Petroleum Company.[5] The Policy Statement established 23 rate areas, including District No. 4 involved herein, and with unimportant exceptions announced maximum rates for each area. In Phillips, the Commission held that the regulation of independent producers under the Act could be accomplished more appropriately by the establishment of area rates than by the establishment of producer rates on individual cost-of-service findings.[6] The Policy Statement established a guideline initial rate for District No. 4 of 18 cents per Mcf.

On August 30, 1962, the Commission issued Opinion No. 362 in Skelly Oil Co., 28 FPC 401. That proceeding involved applications under § 7 for permanent certificates covering sales of gas produced in District No. 4. Therein the Commission disposed of all applications under contracts executed prior to September 28, 1960, the date of the Policy Statement, by the imposition of a 15-cent initial price condition and deferred decision on sales under four contracts bearing a later date. On the same day as the Skelly decision, the Commission promulgated its Fifth Amendment to the Statement of General Policy No. 61-1, 28 FPC 441, reducing the guideline initial rate in District

4. 24 FPC 818

5. 24 FPC 537, affirmed D. C. Cir., 303 F. 2d 380, 373 U. S. 294.

6. The first area rate proceeding was initiated by Commission order dated December 23, 1960, 24 FPC 1121, and culminated in Opinions Nos. 468 and 468-A filed in August and October, 1965, and now under review in this court. See Skelly Oil Company v. Federal Power Commission, No. 8385, and companion cases.

No. 4 from 18 cents to 16 cents effective the same date. The four applications which had been severed from Skelly were then consolidated with a number of applications covering District No. 4 sales under contracts made between September 30, 1960, the date of the Policy Statement, and August 30, 1962, the date of the Skelly decision and the Fifth Amendment. The consolidated proceedings went forward under the style Amerada Petroleum Corporation, et al., Docket Nos. C162 etc.

In its order for the consolidated hearing the Commission stated:

> "In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15-cent per Mcf price which we found to be the in-line price as of September 28, 1960, the 16-cent price which is being adopted as the future area ceiling price for this area, or the 18-cent per Mcf price established on September 28, 1960."

The application covered initial contract-based rates ranging from 15.9 cents to 19.8 cents.[7] During the pendency of their applications for permanent certificates, numerous producers requested and received temporary authorizations under § 7(c) of the Act and § 157.28 of the Commission regulations thereunder.[8] These were issued ex parte and without notice or hearing. Many of the temporary certificates did not contain an express refund condition.

The Amerada proceedings before the Examiner went forward contemporaneously with the judicial review of the Skelly decision, Opinion No. 362. In Amerada the producers offered, and the Examiner declined to receive, testimony and exhibits covering economic and financial requirements. Texaco Inc. sought to obtain the disclosure

7. There was only one proposed price at 19.8 cents. The next highest was 18 cents. The proponent of the 19.8-cent price is not seeking review of the Commission action.

8. 18 C. F. R. 157.28.

and production of Commission records pertaining to the establishment of the guideline initial prices in the Policy Statement and the Fifth Amendment. This was denied. Review of the Commission actions upholding the Examiner on these two evidentiary issues was sought and denied in Texaco Inc. v. Federal Power Commission, D. C. Cir., 329 F. 2d 223, certiorari denied 375 U. S. 941, on the ground that under § 19 the petitions for review were premature.

A Commission staff economist presented, and the Examiner received in evidence, Exhibit 16. This exhibit is a summary of price and other information for all District No. 4 contracts dated 1955 or later, filed as rate schedules with the Commission, and calling for a price of at least 14 cents.[9]

The Examiner's decision issued July 23, 1963, recommended the grant of permanent certificates of public convenience and necessity to all producer applicants on specified conditions, two of which are pertinent here. The initial price was to be no greater than 15 cents per Mcf and no refunds were required of producers selling gas under temporary authorizations which did not contain any specific refund condition. Both the producers and the distributors filed exceptions to the Examiner's decision.

While the matter was pending before the Commission, the District of Columbia Circuit decided the Skelly case.[10] That decision affirmed the 15-cent in-line price established by Opinion No. 362 for District No. 4 sales under contracts made before September 28, 1960, and reversed the Commission holding that refunds could not be required when the temporary authorization contained no express refund condition.

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9. The witness said that he excluded sales below 14 cents because "the 14 cent level is the lower suspension level of Commission Policy Statement 61-1."

10. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, certiorari denied sub nom. Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963.

By its Opinion No. 422, here under review, the Commission upset the Examiner on both the price and refund issues. It fixed the in-line price at 16 cents per Mcf and deferred the question of refunds under contracts having no express refund conditions.

With this background we first consider the rejection of the proffered evidence. Several producers jointly tendered testimony and exhibits covering economic and geologic factors pertinent to the area. The showing was that exploratory and drilling costs have substantially increased between the time when the majority of contracts in Skelly had been executed and the execution of the contracts with the prices here in dispute; that the public interest required further exploratory and drilling efforts in the area because of increasing demand and lessening supply; and that the public convenience and necessity required initial contract prices up to and including 18 cents per Mcf. The Commission upheld the Examiner's decision to exclude the evidence because it was not relevant to a § 7 proceeding where the test is public convenience and necessity rather than the determination of a just and reasonable rate.

CATCO [11] holds that the Act does not require a determination of just and reasonable rates in a § 7 proceeding; that if a proposed price is "out of line" the Commission may impose conditions; and that to protect the public interest the Commission acts in a § 7 proceeding "to hold the line awaiting adjudication of a just and reasonable rate." CATCO does not define the "line" and does not fix standards by which a determination may be made of whether a price is "in line" or "out of line."

In Callery the Supreme Court said that under § 7 "adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." [12] With reference to cost and economic trend evidence, the Court mentioned

11. 360 U. S. 378, 390-392.
12. 382 U. S. 223, 227.

the experience of the Commission, said that the Commission "properly and constructively exercised its discretion in declining to consider this large quantity of evidence," and concluded that the rejection of such evidence is "an appropriate step" in the streamlining of Commission procedures.[13]

The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity. We do not say that economic and geologic evidence is never admissible in a § 7 proceeding. This may depend on varying circumstances. All we say is that in the posture of this case the Commission did not abuse its discretion by rejecting the evidence.[14]

By request to the Examiner and by application for a subpoena duces tecum and ad testificandum, Texaco Inc. sought to obtain the disclosure of the data and materials underlying and supporting the price levels for initial sales in District No. 4 as announced by the Commission in its Policy Statement and in the Fifth Amendment thereto. In sustaining the Examiner's denial, the Commission pointed out that the burden is on a producer-applicant to prove that a certificate is required by the public convenience and necessity; that the effect of the Texaco motion is to place on the Commission the burden of justifying the price expressed in the Policy Statement; and that Texaco had demonstrated no reason for the production of the docu-

13. Id. at 228, note 3.

14. See Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 246-247.

ments and issuance of a subpoena as requested. Consideration of this problem is entwined with the intent and effect of the Policy Statement.

We have noted that the Policy Statement fixed an 18-cent price, that Skelly, Opinion No. 362, fixed a 15-cent price for the period prior to the issuance of the Policy Statement, that the Fifth Amendment to the Policy Statement fixed a 16-cent price, and that we are here concerned with contracts executed between the date of the Policy Statement and the date of the Fifth Amendment. The producers argue that the Policy Statement established an 18-cent in-line rate. The distributors contend that Skelly established a 15-cent in-line rate. None of the petitioners are happy with the 16-cent rate which the Commission decreed.

The basic claim of the producers is that the Policy Statement set in-line prices on which they were entitled to rely. In our view this is a misconception of the Commission action. The Policy Statement is just what it purports to be—an ex parte statement issued without hearing by an agency to advise the public properly of the manner in which the agency proposes to exercise a discretionary power. Reference is made therein to "price standards" and "price levels." The purpose is that of "guidance and initial action by the Commission." The effect is that, "in the absence of compelling evidence calling for other action," producer applications for certificates proposing higher rates than those listed will be either denied or conditioned. The result is that the Policy Statement plays a "significant role" in arresting the upward trend of producer prices.[15]

The announcement of a guide to price levels or price standards is not the establishment of an in-line price. That is accomplished after notice and hearing in an appropriate proceeding—not in a policy declaration. No doubt de-

15. Wisconsin v. Federal Power Commission, 373 U. S. 294, 312-313.

signedly, the Commission did not specify the formula which it used in arriving at the guideline rates. Its failure to do so may put a burden on producers and distributors alike in any attempt to show that a guideline price should or should not be adopted as an in-line price. The presence of such burden neither requires nor permits a party to go back of the Policy Statement in search of its justification. That is the administrative concern of the Commission. It follows that the request and application of Texaco for the underlying data and materials were properly denied.

The Commission may not rigidly and arbitrarily impose a guideline price as an in-line price. The Policy Statement recognizes that compelling evidence may call for action other than granting a certificate at the guideline price. The point is that, in the context of the proceedings before us, the establishment in 1960 of the 18-cent guideline cannot be ignored by the Commission in arriving at the in-line price.[16] Its effect had to be, and was, evaluated by the Commission.

The other extreme of the dispute is the position of the distributors who say that the 15-cent price established in Skelly, Opinion No. 362, for contracts executed prior to the date of the Policy Statement is the in-line rate which is presumed to continue until a just and reasonable rate has been determined in an area rate proceeding.[17] We agree with the distributors that the in-line procedure is an interim device and is not intended to be a permanent method of producer regulation. It is a necessary device

16. In Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 247, the court said: "The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion."

17. The just and reasonable rate for the sales certificated by the Commission in the order under review will be fixed in the Texas Gulf Coast Area Rate Proceeding, AR64-2, now in hearing before a Commission Examiner.

to arrive at an in-line price on the basis of only 1.39% of the volumes for all sales shown. In the UGI decision of the Ninth Circuit, mentioned above, the court said that the line "may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce." [24]

Thus we have here a situation vastly different from that presented in the cases which have dealt with the suspect price doctrine. Exhibit 16 included the sales under consideration in the very proceedings in which the exhibit was presented. The distributors say that this is an impermissible bootstrap procedure. The producers in turn say that the reason for the small percentage of sales free from attack is the action of the distributors in contesting all sales above the price which is acceptable to the distributors.

In the determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. At the same time, when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries. In fixing the 15-cent price for District No. 4 sales which preceded the Policy Statement, the Commission in Skelly gave a "limited degree of consideration" [25] to the price range of contracts resulting in temporary certificates although it recognized that they were not "as persuasive" [26] as permanent certificates. The price fixed in Skelly was upheld by the District of Columbia Court of Appeals which commented that the Commission gave "less consideration" to the temporary certificates than it did to the permanents.[27]

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24. 283 F. 2d 817, 823.

25. 28 FPC 1065, 1068.

26. 28 FPC 401, 409.

27. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 245-246.

An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the "suspect price" doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the "unreviewable fiat" of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates.

The producers say that the in-line price for permanent certificates should be the highest price at which substantial quantities of gas move in interstate commerce and that here the Commission has fixed the lowest rather than the highest price.[28] The producers rely on the statement in Callery that:[29] "We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." This language does not mean that the public interest is not protected if the sales are approved at less than existing levels.

The distributors point to the decision in Atlantic Refining Co. v. Federal Power Commission, D. C. Cir., 316 F. 2d 677, 679, which says that "if the Commission is to err in setting an initial rate, it should err on the low side" because of the right of a producer to file immediately for a rate increase under § 4. From this premise they argue that the 15-cent price of Skelly should have been adopted. The provisions of § 4, although they may not be disregarded, are not a complete answer. Rate increases filed thereunder are sub-

28. The opinion of the Commission says: "The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf." 31 FPC 623, 637.

29. 382 U. S. 223, 227.

ject to suspension. The producers may have the use of the money collected but it is at interest if refunds are ordered and royalty and tax payments have to be made on the total amount collected. If the just and reasonable rate as finally determined is greater than the in-line rate adopted, the producers have no way of recouping their losses.[30] Our view is that the possibility of filing for increased rates under § 4 does not require that the Commission fix the price in a § 7 proceeding at a figure lower than that at which substantial volumes of gas are currently contracted for sale in interstate commerce.

Both producers and distributors attack the 16-cent price on the ground that it results from an improper use of, and reliance on, agency expertise. For over 12 years since the decision in Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, the Commission has been struggling to regulate the independent natural gas producers under an act which is not well designed for the attainment of that objective. Serious administrative problems have developed. Procedures and methods have changed from time to time. Whether those now in use will receive full judicial approval remains to be seen. In the economic regulation with which the Commission is concerned the experience of the past must be projected into the future. The importance of expertise may not be downgraded. A delicate balance must be maintained between producer and consumer interests if the continued life of the industry is to be assured.

We have noted that an in-line price continues until substantial evidence shows a change. The producers point out that the Commission controls the variables which would result in a change by rejecting evidence both of producers' costs and of initial prices which it considers suspect. The potential for circuity of action does not impress us too

30. An example is found in the pending Permian Basin Area Rate proceedings. The Policy Statement fixed the guideline price at 16 cents but the just and reasonable rate for new gas sold under contracts dated after January 1, 1961, was fixed at 16.5 cents.

much. The cost evidence has been refused because it goes to the just and reasonable rate issue. In a § 7 proceeding the test is public convenience and necessity and evidence relevant thereto should be received. In the applications before us this evidence, in large measure, has taken the form of a showing of contract-determined initial prices. The Commission has given consideration to prices under temporary authorizations and under permanent certificates. Greater weight has been given to the permanent than to the temporary certificates. Some prices have been discounted as too high and some as too low. We believe this is proper. Here, at least, the result reached has not come from the use of a crooked yardstick.

The analysis and use of field prices established by producer-pipeline contracts require expertise. Objections to the use of weighted averages are not well taken. Such averages are necessarily lower than the highest prices paid. At the same time nothing is wrong with the use of weighted averages to compare price levels. Here the Commission has made such comparisons. These are proper as long as the action is not capricious or arbitrary.

It is apparent that in the case at bar the Commission was confronted with a difficult situation. CATCO tells it to hold the line. The Ninth Circuit UGI decision [31] says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same

31. 283 F. 2d 817.

deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."[32] We find no abuse of discretion and affirm the 16-cent price.

The path from the morass of in-line prices leads directly to the thicket of refunds. Here again the traveled way is not well marked and we have a three-way disagreement among the parties over the route to be followed.

In the consolidated proceedings before the Commission, 27 of the 35 dockets related to applications in which temporary certificates had been issued without any express refund condition.[33] The Examiner held that on the authority of Opinion No. 362, Skelly, he had no power to order refunds when the temporary certificate did not contain an express refund provision. While the proceedings were pending before the Commission on exceptions, the District of Columbia Circuit reversed the pertinent holding in Opinion No. 362.[34] On the authority of that decision the Commission reversed the Examiner on the refund issue and held that "the public interest would best be served by deferring for the present the decision whether refunds should be ordered * * *, and if so, the extent of such refunds." The Commission said that the parties "will be given an opportunity to submit further briefs on the issue of refunds."

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32. People of the State of California v. Federal Power Commission, 9 Cir., 353 F. 2d 16, 23. See also Charleston & Western Carolina Railway Company v. Federal Power Commission, D. C. Cir., 234 F. 2d 62, 64.

33. In the remaining 8 applications a typical authorization is conditioned upon the refund to purchasers of "any amounts collected plus interest at 7 percent per annum in excess of 15.0 cents per Mcf which may be determined to be in excess of the price required by the public convenience and necessity."

34. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, certiorari denied sub nom. Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963.

At the outset we are met by the Commission argument that the refund issue is not now reviewable because § 19(b) makes aggrievement a jurisdictional prerequisite to review of Commission orders and here aggrievement is absent because no refunds have been required. In denying the Commission motion to dismiss the Sunray petition [35] we held that Sunray was likely to suffer injury by the determination of the in-line price and that the threat of refunds made it an aggrieved party.

The threat has been followed by action. On July 27, 1966, the Commission issued Opinion No. 501 in the Amerada consolidated dockets which were considered in Opinion No. 422 here under review.[36] Opinion No. 501 says that the producers therein listed "will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates" with the exception of certain royalty and tax payments not pertinent here. The producers listed include Sunray and six others who are petitioners in these proceedings. They are required to report their excess collections and hold them subject to the further order of the Commission "directing the disposition of those amounts."

Opinion No. 422 as implemented by Opinion No. 501 adversely affects Sunray and the other six producers. Although payment itself is not yet required, the producers are

35. Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 351 F. 2d 395, 400. The position of Sunray is important because all other petitions to review are transfers from other circuits.

36. This opinion was called to our attention during the argument of the South Louisiana cases, our Docket Nos. 7912 etc., Pan American Petroleum Corporation, et al. v. Federal Power Commission. We also have pending before us Docket No. 9000—Skelly Oil Company v. Federal Power Commission—which seeks review of Commission Opinion No. 492. A court may take judicial notice of its own records. Dial v. Johnson, D. C. Cir., 259 F. 2d 189, 190. Although Opinions Nos. 492 and 501 were issued after the case at bar had been argued orally and submitted for decision, they are not controverted and the demands of justice require that we notice them. See Ellis v. Cates, 4 Cir., 178 F. 2d 791, 793, certiorari denied 339 U. S. 964.

told that the excess collections do not belong to them. The only thing which remains to be decided is the question of who gets the money and under what conditions. This is not a case like either Texas Eastern Transmission Corp. v. Federal Power Commission, 5 Cir., 357 F. 2d 232, or United Fuel Gas Company v. Federal Power Commission, 4 Cir., — F. 2d —. They related to an order directing that refunds generated by a settlement agreement be retained by the producer pending Commission inquiry into whether release of the refunds to the pipelines would be proper. There the obligation to refund was fixed by the settlement. Here the obligation to refund is fixed by a Commission order. A producer has a right to a prompt determination of its liability. We believe that the question of the power of the Commission to order refunds of amounts collected under temporary certificates containing no express refund condition is ripe for determination and that proper judicial administration requires that it be deferred no longer.

Temporary certificates are issued ex parte and without hearing under § 7(c) of the Act in accordance with Commission Regulation § 157.28(c).[37] A party aggrieved by the issuance of such certificate has the right to judicial review.[38] The first attack on the absence of an express refund condition in the temporaries here under consideration came when the distributors, during the pendency of the proceedings before the Examiner, moved for the termination of the temporaries or in the alternative for a floorless refund condition. The Commission denied the motion. It declined to impose the refund condition because "we think clearly this would not be a proper action for us to take here." It further said that such action "would so denature the value of

37. 18 C. F. R. § 157.28(c). Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 327 F. 2d 893, 896, upholds the applicability of § 7(c) to independent producers and the validity of the regulation.

38. Id. at 895. The Court there held that the New York Public Service Commission had the right to petition for the review of an order granting a temporary certificate.

a commission authorization as to place any reliance upon our actions in this area in serious jeopardy" and that "we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates" as requested by the distributors. The distributors did not seek review. We do not accept the producers' view that the unreviewed denial of the motion irrevocably determined the refund issue. The Commission could change its mind. At the same time the reasons given for the action are most compelling and show mature consideration of the problem.

The distributors emphasize the importance of refunds to the protection of the consumer interests. This may be conceded to the extent that refunds are passed down to the ultimate user. These benefits must be weighed against the desirability of the maintenance of an adequate supply of gas. A repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers. We will not speculate on the effect of such repricing on their exploration and development activities. The benefits derived from such costly activities may or may not be of greater value, from the public standpoint, than the few dollars recovered by the home consumer. Perhaps he would rather have an assured supply for his expensive appliances than a modest refund. In any event the record does not purport to cover such issues and we turn to the decisions which the parties say control the outcome.

In our opinion the Callery decision[39] does not dispose of the issue presented here. The Supreme Court was there concerned with South Louisiana prices which had been the subject of much litigation.[40] The Court recognized that the Commission may not make reparation orders but said that "it is not so restricted where its order, which never became

39. United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223.

40. See CATCO, 360 U. S. 378, and Public Service Commission of the State of New York v. Federal Power Commission, 361 U. S. 195, reversing 269 F. 2d 865. See also cases cited supra note 23.

final, has been overturned by a reviewing court'' and that ''judicial review at times results in the return of benefits received under the upset administrative order.''[41] The situation here is different. This is the first judicial review of the prices under consideration and we uphold the Commission on its in-line rate.

In Sunray Mid-Continent Oil Company v. Federal Power Commission, 10 Cir., 270 F. 2d 404,[42] Sunray applied for temporary authority which was granted on the condition that an undertaking be filed ''to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity.'' We pointed out that Sunray was required ''to speculate'' as to what the rate might be and was denied ''its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part.''[43]

We have noted that Commission Opinion No. 362 pertaining to District No. 4 sales made under contracts executed prior to September 28, 1960, was set aside by the District of Columbia Circuit on the refund issue.[44] The Court there held that the ''power [to order refunds] does not depend upon an explicit refund provision in a temporary certificate.''[45] The Court went on to say that the exercise of the power was not ''mandatory'' and that the ''refund

41. 382 U. S. 223, at 229.

42. The Sunray Mid-Continent case considered two consolidated petitions for review. We are here concerned with No. 6061.

43. 270 F. 2d 404, at 408-410.

44. The Supreme Court denied certiorari to review the District of Columbia Circuit decision. See Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963. Denial of certiorari "imports no expression of opinion upon the merits of the case." United States v. Carver, 260 U. S. 482, 490, and Pan American Petroleum Corp. v. Federal Power Commission, 10 Cir., 352 F. 2d 241, 243.

45. 329 F. 2d 242, at 249.

issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates."[46]

The Court quoted the general language of the temporary certificates[47] that "acceptance for filing shall not be construed as constituting approval of any rate" and that authorization and acceptance of the rate schedule "are without prejudice to such final disposition of the certificate application as the record may require." It then concluded that "all else aside" these provisions authorize the conditioning of a permanent certificate by a refund requirement.

In our opinion these provisions mean that the Commission is not binding itself, by the issuance of a temporary certificate, to issue an identical permanent certificate of prospective effect after a hearing.[48] In its denial of the distributors' motion for refund conditions the Commission gave no recognition or effect to such provisions. We believe that the Commission intended the routine, boiler-plate language to have a purpose entirely different from that of an express refund condition.

When a producer dedicates its gas to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission ap-

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46. Id. at 250.

47. This language is quoted in 329 F. 2d 242, at 249 and is the same as that found in the temporary certificates which are in the record before us and which do not contain express refund conditions.

48. Included in the dockets considered by the Commission in this consolidated proceeding was No. C162-276 in which a temporary certificate was issued to, but not accepted by, Sun. It contained a definite refund obligation covering collections at a rate above 15 cents per Mcf and the provision that: "This temporary certificate and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require." The inclusion of this routine langauge could not mean that the explicitly floored refund obligation became floorless.

proval."[49] If the language mentioned means that a producer accepting such certificate without express refund conditions dedicates its gas without any floor on the rate, the producers have taken many uncalculated and uncalculable risks. We suggest that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance.

The situation in the case at bar differs from that presented to the District of Columbia Circuit. The proceedings there involved § 7 applications for permanent certificates covering District No. 4 sales under contracts executed before the issuance of the Policy Statement. Here we are concerned with sales under contracts made between the date of the Policy Statement and the date of the Fifth Amendment. For that period the guideline initial rate was 18 cents. The temporary certificates with which we are concerned were issued "at prices not exceeding 18¢ per Mcf."[50] The 18-cent figure is significant and meaningful.[51] It resulted from the exercise of Commission expertise. When the producers dedicated their gas under temporary certificates permitting the collection of prices up to 18 cents without express refund obligation, they were entitled to rely on them. They were entitled to rely on the prior decisions of the Commission declining to order refunds of collections under unconditionally authorized temporary certificates.[52] For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate. We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed so that it may make an intelligent decision whether

49. Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U. S. 137, 156. See also § 7(b) of the Act.

50. See Opinion No. 501.

51. See Sohio Petroleum Company v. Federal Power Commission, 10 Cir., 298 F. 2d 465, 468.

52. See dissenting opinions of Commissioner O'Connor in Opinions Nos. 492 and 498.

to accept or reject the certificate. Such was our holding in Sunray Mid-Continent and we adhere to it. In our opinion, absent the special considerations recognized in Callery, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

The motions to adduce additional evidence are severally denied. The cases are all remanded for further proceedings consistent with this opinion.

SETH, *Circuit Judge*, dissenting in part:

I respectfully dissent on the issue of the "in-line" price because the Commission, in its determination of this issue in the consolidated cases here on review, has adopted a new concept of "in-line" which constitutes too wide a departure from prior usage and practice and from the authorities to be approved.

The Commission has here divided the range of prices into several segments, and has announced that the price here to be certificated is the lowest segment, ". . . the lowest price at which substantial volumes of new gas were sold in interstate commerce . . . ." The Commission is very candid in its selection of this lowest price. Its findings and its comments on the evidence show that a higher price would otherwise follow. For example, the Commission stated that the evidence ". . . points in the direction of a higher price . . . ," than 16 cents which was the price here adopted. The Commission also said: "Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed."

The Commission also found that only a price above 18 cents ". . . would have an adverse impact on the pricing structure in the area."

The selection of the lowest segment is explained by the Commission in its opinion where it states: "In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications."

To provide some factual material on this particular issue, reference should be made to the evidence upon which the Commission placed its principal reliance, if not its sole reliance. This consisted of the following:

1. The Commission's Statement of General Policy No. 61-1, September 28, 1960, 24 F. P. C. 818, announcing an 18 cent guideline price.

2. The Fifth Amendment to Statement of General Policy No. 61-1, August 30, 1962, 28 F. P. C. 441.

3. Staff Exhibit No. 16, admitted at the hearing, which consisted of a summary of field prices under contracts executed between January 1, 1955, and August 31, 1962, for sales in Texas Railroad Commission District No. 4 on file with the Commission and having a total initial rate of 14 cents per M.c.f. This exhibit included permanent certificates, temporary certificates, and the sales which were in issue in the consolidated proceedings.

Of the above several exhibits, the Commission considered Staff Exhibit No. 16 as the most important. The opinion of the Commission with reference to this exhibit, and to the period in issue, shows the following:

1. The weighted average price by volume was above 17.178 cents.

2. Eighty-two per cent of the gas sold was at 16.0 cents *and above.*

3. Seventy-one per cent of the gas was being sold at 17.0 cents *and higher.*

4. The table in the Commission's opinion with reference to this Exhibit also shows that twenty-seven per cent of the gas was sold at 16 cents *and below* and twenty-eight per cent at 16.5 cents *and below.*

The Commission found that 16 cents was the "in-line" price and stated, as referred to above, ". . . . the record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area in the period in question was 16 cents per M.c.f."

The use in the text of the opinion of the term "and above" in the finding that eighty-two per cent of the gas passed at 16 cents and above appears to be somewhat unusual in view of the Commission's selection of the lowest price. It would appear that the reference to percentages or quantities of gas would instead include the amounts which passed at a figure of 16 cents or less. The opinion itself shows that some ten per cent of the gas was sold *at 16 cents,* some eleven per cent of the gas was sold at 16 cents to 16.5 cents, inclusive, and twenty-seven per cent at 16 cents *and below.*

As stated above, it is however not necessary to demonstrate by the figures that the Commission selected the lowest segment by reason of their recitation that they were so doing. In this consideration it should also be borne in mind that the Commission also found that there would be no adverse impact on the pricing structure in the area except by a price above 18 cents.

There would seem to be no question but what an "in-line" price is to be determined on the basis of contemporaneous certificates as stated by the Supreme Court, and on contemporaneous contracts where necessary. This price must represent the prevailing current conditions as the Commission states in its opinion. United Gas Improvement Co. v. Federal Power Comm'n, 283 F. 2d 817 (9th Cir.). The Supreme Court has clearly stated that the "in-line" price is a device which will prevent gas from entering the interstate market ". . . at prices higher than the exist-

ing levels . . . . ."; and ". . . consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect.'" United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223. Also "where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in the triggering of general price rises . . . ." Atlantic Refining Co. v. Public Service Comm'n, 360 U. S. 378.

The Commission in its determination of the "in-line" price in this case by an adoption of the lowest price departed from the "current conditions test," and the "existing levels test," referred to by the Supreme Court. This departure represents a basic change in policy, and is not just a difference in what quantity may constitute a "substantial quantity." The Commission did not base its decision on such a distinction. It clearly and candidly selected the lowest segment of the price range. The Supreme Court in its references to current conditions can only mean the prevailing or predominant conditions existing in the area and cannot mean the lowest or the highest of the prices, for such are not typical or prevailing prices. In common usage something "in-line" is in conformance with other persons or things; it is, to borrow a phrase from the civil rights vocabulary, "in the mainstream"; it is a "prevailing price," a "going rate." It is not of the extreme in any direction, it is not the widest, the longest, the lowest, or the highest.

The Commission properly used the permanently certificated prices, and the temporary certificated prices, including the prices in issue here. I agree with the majority that these contracts or prices elsewhere referred to as "suspect" must be used in this case. They must be used for all purposes. This was the only data available for a realistic consideration of the issues, the economic data

of the petitioners having been excluded. The Commission considered all the certificates in order that it could have before it a "substantial quantity" of gas. It rejected the examiner's limited consideration with the following language:

> "Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the 'in-line' price amount to only 1.39 per cent of the volumes for all sales shown and to no more than 2.05 per cent of the sales permanently certificated in the District contained in the exhibit."

and

> ". . . In such circumstances it can hardly be maintained that the 'in-line' test of the 'prices under which a substantial amount of natural gas presently moves in interstate commerce' has been fully met by the examiner. In our opinion it would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently non-representative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets."

Thus all were considered to attain a sufficient volume, and the Commission did not and could not then disregard the temporary certificates on the price issue. Nor did the Commission state in its opinion that the temporary certificates were to be given less weight in its determination in this case. There is also no indication that they were given less weight other than the arguments in the briefs. The Opinion of the Commission in its explanation as to why the temporary certificates should be considered referred to its Texaco Seaboard case, 29 F. P. C. 593, where it said permanent certificates are decidedly more persuasive than are temporary, but continued ". . . . this does not thereby render temporary authorizations *per se* inadmissible." The Commission then said:

> "The soundness of this principle is readily apparent when viewed in the light of the facts before us, where, absent the ability to consider these authorizations, we would not be basing our decision upon 'substantial volumes of gas moving in interstate commerce.'"

The Commission then refers to the examiner's consideration quoted above. These references are only to *what* should be examined.

Thus the Commission considered the very large proportion of gas passing under temporary certificates, but did not state that this should receive less consideration or be given less weight than that permanently certificated. The Commission only stated:

> "We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the 'in-line' price for this period. Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the 'in-line' level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed."

Thus from what is said in the Opinion, it cannot be concluded that the Commission has given less weight to the prices in the temporary certificates. With the minute percentage of the volumes considered being permanently certified, it would indeed require that the temporary certificates be virtually disregarded to explain a 16-cent price, and there is no indication that the Commission did so.

The Supreme Court has repeatedly said that the prices added as conditions to certificates under Section 7 do not

constitute initial pricing by the Commission. Federal Power Comm'n v. Hunt, 376 U. S. 515. Thus the Commission is to set a price in the public interest and in line with current conditions in the area, not what the Commission thinks is just and reasonable or to be on the "safe side," one way or the other, for that would clearly be initial pricing. The selection here by the Commission of the "lowest price" by the exercise of its expertise is initial pricing because it is not and does not purport to represent "current conditions."

This error by the Commission is one of law. It is the erroneous application of the standards set by the Supreme Court for the determination of "in-line" prices.

It would seem to be unnecessary to dwell on the importance of the Commission's determination of "in-line" prices, as the delays which are necessarily inherent in their determination and in any subsequent determination of just and reasonable rates are obvious. The period under consideration in these consolidated cases begins in 1960, and the case concerns certificates covering some 31,500,000 M.c.f. per year. It is apparent that the prices so established will remain in effect for many years, and consequently large quantities of gas will be sold under any determination of "in-line" prices by the Commission. The Supreme Court, in Atlantic Refining Co. v. Public Service Comm'n, 360 U. S. 378, referred to the "inordinate delay presently existing in the processing of § 5 proceedings, . . ." and again in the same case to ". . . . the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears well nigh interminable." These prices have in reality become more than a mere interim device, especially when coupled with moratoriums which may be imposed by the Commission.

Thus the importance of the "in-line" determination of the price additive to public convenience and necessity becomes all the greater. The Commission's methods and the evidence used to support its findings must be more closely scrutinized.

Thus I would conclude that the Commission committed an error in law in applying the wrong standards for its determination of 16 cents as the "in-line" price in this case. This was selected, as the Commission states, as the lowest price, and I would remand the case for a determination not of the lowest price and not of the highest price, but of the "in-line" price.

On a somewhat different point I also disagree with the majority. Reference is made in the majority opinion to Superior Oil Co. Opinion No. 437, 32 F. P. C. 241, and there is adopted a rule that the "in-line" price once established is presumed to continue until "substantial evidence is presented that it has changed." If this means that some sort of a presumption attaches to prior "in-line" prices which must be overcome, I disagree.

The authorities demonstrate clearly that the "in-line" price is to be determined on the basis of contemporaneous certificates, contracts, and price data. This necessarily contemplates the possibility of change from time to time in either direction. Sohio Petroleum Co. v. Federal Power Comm'n, 298 F. 2d 465 (10th Cir.). Once an "in-line" price is established, it continues for those bound until *formally* changed but this does not necessarily mean that a presumption attaches to a previous "in-line" price which must be overcome by any greater weight of evidence than would be required had no "in-line" price been established. There is no basis in the statutes for a presumption or continuing weight to be given to a prior determination in another proceeding. By definition the "in-line" price is what then prevails and not what has prevailed in the past nor influenced by what has prevailed in the past. Whether the change is large or small should of itself make no difference in the determination; the changes from time to time should freely come about, based upon conditions as they may then exist.

APPENDIX B.

JUDGMENT.

Nineteenth Day, November Term, Friday,
December 9th, 1966.

Before HONORABLE JEAN S. BREITENSTEIN, HONORABLE DELMAS C. HILL and HONORABLE OLIVER SETH, *Circuit Judges.*

These causes came on to be heard on petitions to review orders of the Federal Power Commission and motions to adduce additional evidence and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the motions to adduce additional evidence are severally denied, and the causes remanded for further proceedings consistent with the opinion of the court.

By order of January 7, 1967, the mandate of the United States Court of Appeals was stayed to February 13, 1967.

By order of February 10, 1967, the mandate of the United States Court of Appeals was stayed to March 6, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*,

v.

FEDERAL POWER COMMISSION, EDWIN L. COX, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, SOHIO PETROLEUM COMPANY, SUN OIL COMPANY, SUNRAY DX OIL COMPANY, TEXACO INC., AND UNION PRODUCING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and the Public Service Commission of the State of New York pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 9, 1966.

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. 15-48[1]) is reported at 370 F. 2d 181. The opinion and order of the Federal Power Commission is reported at 31 FPC 623.

JURISDICTION

The judgment of the court of appeals affirming in part and reversing in part the Commission's order was entered on December 9, 1966 (Appendix A, *infra*, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. In passing upon producer certificate applications under Section 7 of the Natural Gas Act, may the Federal Power Commission, consistent with this Court's *Catco* decision,[2] elevate its previously determined inline certificating level by reference to: (a) the prices contained in the contracts for which certificate authority is being sought, (b) the prices contained in temporary certificates issued on an *ex parte* basis pending the outcome of the statutorily required hearing on the underlying certificate application, and (c) the "guideline" prices contained in the Commission's Statement of General Policy?

2. Where the Commission, having issued *ex parte* temporary certificates to producers pending hearing

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[1] "FPC Pet." refers to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. ——.

[2] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

and disposition of their certificate applications, determines after full hearing on those applications that the prices collected pursuant to the temporary certificates were out of line and not consistent with the public convenience and necessity, does the Commission have the power and the duty to require the producer applicants to refund the excess amounts collected under the temporary certificates?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out in Appendix B, *infra,* pp. 2a-6a.

STATEMENT

Background—The Gulf Coast area of Texas, which in recent years has accounted for 17-20% of all gas sold for resale in interstate commerce, has been divided into three districts by the Texas Railroad Commission, and the state commission's classification has been followed by the producing industry and by the Federal Power Commission. The most southerly district—and the one directly involved in this proceeding—is Texas Railroad Commission District No. 4, a fifteen-county area bounded on the south and west by Mexico and on the east by the Gulf of Mexico. Immediately to the north along the Gulf is District 2, a ten-county area, and to the north of District 2 and stretching to the Louisiana border are the twenty-nine counties comprising District No. 3. Most of the major pipelines serving the Northeast begin in the Texas Gulf Coast and traverse these three Districts before heading into Louisiana and on north.

Although at the advent of producer regulation, in 1954, gas in the Texas Gulf Coast sold at an average price of less than 10¢ per Mcf, during the late '50's the Commission authorized a number of new sales at higher prices, culminating in a series of orders in 1959-60 certificating new sales at prices as high as 18¢ per Mcf. These levels were arrived at, however, in Commission proceedings from which interested consumer intervenors had been excluded, and on appeal the courts held that such exclusion was improper and remanded the cases to the Commission for further proceedings. *Public Service Commission of New York* v. *F.P.C.*, 295 F. 2d 140 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 948. Then, in September 1960—after its issuance of the 18¢ certificates and while the ultimately successful appeal from those certificates was pending—the Commission, acting *in camera*, issued a Statement of General Policy, 24 FPC 818, in which it announced for each producing area the "guideline" initial-price levels at which, in the absence of objection, it intended to certificate new sales. These guideline levels were, as Mr. Justice Clark was subsequently to observe, based on "the *highest* permanently certificated rate in the respective areas as of September 1960", they were "nonreviewable", and they had "no binding effect", *Wisconsin* v. *F.P.C.*, 373 U.S. 294 at 316, 327 (dissenting opinion). The initial-price guidelines for Districts 2, 3, and 4 were fixed at 18¢ per Mcf, but, as the Commission itself later conceded, the sales on which the Gulf Coast guideline levels were based had been erroneously certificated after exclusion of interested consumer interveners, and they could not be used for in-line purposes.

The first contested Commission proceeding involving the Gulf Coast area to be decided following issuance of

the Policy Statement—and the first to be decided in accordance with this Court's *Catco* standards—was the *Skelly* case, *Skelly Oil Co.,* Op. 362, 28 FPC 401 (1962).[3] There, the Commission held that the proper certificating (or "in-line") level in District 4, at least for contracts entered into prior to the September 1960 Policy Statement, was 15¢ per Mcf. However, with two Commissioners dissenting, the Commission concluded that it should not decide on the basis of the *Skelly* record that the in-line level had continued at 15¢ *after* issuance of the Policy Statement, and accordingly it severed from *Skelly* and set for separate hearing four dockets based on contracts entered into after September 1960. Contemporaneously with its *Skelly* opinion, the Commission revised its Policy Statement guideline for District 4 from the 18¢ established in September 1960 to 16¢, or 1¢ more than the in-line level it had just found in *Skelly,* 28 FPC 441. The dissenting Commissioners, unable to perceive how issuance of the *in camera* 18¢ guideline (now demonstrated by the record in *Skelly* to be excessive by 3¢) could have any effect on the in-line level, would have issued certificates conditioned at 15¢ to the four *Skelly* applicants having post-September 1960 contracts, and would have reduced the guideline level for the future to the 15¢ in-line price.

The Present Proceedings—The four dockets severed from the *Skelly* case were consolidated with 34 other producer applications to sell gas from District 4 fields under the lead docket, *Amerada Petroleum Corporation,* CI62-1544, 28 FPC 397 (J.A. 197). The *Amerada*

[3] Affirmed as to in-line level, *Public Service Commission of New York* v. *F.P.C.,* 117 App. D.C. 287, 329 F. 2d 242 (1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.,* 377 U.S. 963.

producer contracts, which called for initial prices ranging from 15.9¢ to 19.8¢ per Mcf,[4] had been entered into between October 1960 and August 1962, and the purpose of the *Amerada* proceeding presumably was to determine the effect, if any, that the Policy Statement had upon the 15¢ in-line level which had obtained in District 4 up to issuance of the Statement.

The most significant evidence presented at the hearing, held in the latter part of 1962, was an exhibit sponsored by an FPC staff economist (Exh. 16, J.A. 163-188) showing price and other information for all post-1954 District 4 contracts which called for a price of 14¢ or more and had been filed as rate schedules with the FPC. The exhibit classified the contracts into three groups: Schedule 1 showed the proposed sales for which certificate authority was being sought in the *Amerada* proceeding itself; Schedule 2 showed all sales which had been permanently certificated; and Schedule 3 showed sales being made under temporary certificates pending Commission action on final certification.

By decision issued July 28, 1963 (31 FPC 647; J.A. 285-341), the examiner held that both as a matter of fact and as a matter of law the promulgation of the Policy Statement guidelines had no effect on the appropriate in-line level for contracts negotiated after promulgation of the guidelines, and that determination of the in-line price for such contracts should be based on the same standards—an analysis of permanently certificated contracts dated during the time period in question—applied by the Commission in *Skelly* and subsequent cases. Such an analysis produced an in-line

[4] Actually, there was only one proposed price at 19.8¢; the next highest was 18¢.

level of 15¢ per Mcf, at which price the examiner recommended that certificates should issue to the *Amerada* producers. On the question of refunds of amounts in excess of 15¢ collected under the temporary certificates, the examiner ruled that he was bound by the Commission's *Skelly* precedent (subsequently reversed on the refund point by the D.C. Circuit[5]) and therefore declined to order refunds.

The Commission's Determination—On March 23, 1964, the Commission issued its order in this case (Opinion No. 422, 31 FPC 623; J.A. 354-96) reversing the examiner on the key finding that the in-line price was 15¢ per Mcf. While apparently conceding that the in-line procedure followed by the examiner and theretofore consistently followed by the Commission—an analysis of permanently certificated contracts that were not suspect—would lead to an in-line finding of 15¢ per Mcf (J.A. 368-70; 394), the Commission held that the prior permanent certifications provided an inadequate sample, and that, accordingly, weight should be given to the contract prices negotiated during the period in question (whether or not certificated by the Commission), to the prices contained in temporary certificates, to the prices being requested by the *Amerada* applicants, to the 18¢ Policy Statement guideline, and to Commission "expertise"; consideration of these factors led the Commission to find an in-line price of 16¢ per Mcf. Commissioner Ross, dissenting, pointed out that none of the bases used by the majority to arrive at the 16¢ figure was legally permissible, and that "the rule [adopted by the majority] in this case is that when the normal evidentiary basis for establishing

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[5] *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242 (1964), *cert. denied*, 377 U.S. 963.

an in-line price is absent, then anything else will do" (31 FPC at 643; J.A. 389).

On the refund question, the Commission, while noting that two months earlier the D.C. Circuit had in the *Skelly* appeal reversed the Commission's refusal to order refunds of excess amounts collected pursuant to temporary certificates, nonetheless deferred to an indefinite future date resolution of the refund matter.

Decision of the Court of Appeals—Within minutes of the Commission's denial of rehearing, Sunray DX Oil Company—the only party to the consolidated proceedings located in the Tenth Circuit—filed its petition for review in the Tenth Circuit. Although Sunray's well had run dry even prior to the commencement of the hearings (see FPC Pet. 58), the Tenth Circuit held that it had proper venue, and accordingly the petitions for review filed by the consumer petitioners in the D.C. Circuit and by the other producers in the Third, Fifth, and Sixth Circuits were transferred to the Tenth Circuit.

The court sustained the Commission's finding that 16¢ was the proper in-line price. Though apparently conceding that the factors relied on by the Commission to arrive at the 16¢ price were, in fact, "suspect" under the prior court and Commission decisions, the court held that, in the circumstances of this case, reference to "suspect" prices was necessary in order to reflect properly "the price at which substantial volumes of gas are currently contracted for sale in interstate commerce." (370 F. 2d at 189; FPC Pet. 28) On the refund question, the court below, noting its disagreement with the holding of the D.C. Circuit in the *Skelly* appeal,

ruled that the Commission was without power to require refunds of excess amounts collected under temporary certificates. Accordingly, it ruled that the Commission erred in severing the refund question, since the only course open to the Commission was to discharge the producers from any refund liability whatsoever. Judge Seth dissented in part. While noting his agreement with the majority's test that the in-line level must be determined by current market conditions, he felt that proper reference to such conditions would yield a figure higher than 16¢.

Related Developments Subsequent to Amerada—In the spring of 1964, shortly after issuance of the *Amerada* opinion here under review, the Commission decided to consolidate for each Texas Gulf Coast district all of the remaining certificate applications in which initial price was an issue: 42 pending District 2 applications were consolidated as a new proceeding, *Sinclair Oil & Gas Co. et al.;* 40 District 3 applications were consolidated as *Hawkins & Hawkins et al.*; and 67 District 4 applications were consolidated as *Turnbull & Zoch Drilling Co. et al.* Following hearings and examiner's decisions in each of the three proceedings, the Commission rendered its opinions in September 1965; in each case the Commission's result was consistent with its result in *Amerada.* Thus, in *Hawkins & Hawkins,* Op. 475, 34 FPC 897, the Commission, two Commissioners dissenting,[6] held that the District 3 pre-Policy State-

[6] Commissioner Black stated in Op. 475: "Although I participated with the majority in [*Amerada*], were that case before us now I would express different views. I do not believe that it is consonant with our responsibilities under the Natural Gas Act as interpreted by the courts for us to rely on temporary prices in cases at issue before us in determining an in-line price."

ment in-line level of 16¢ had escalated to 17¢ upon issuance of the Policy Statement; in *Sinclair Oil & Refining Co.*, Op. 476, 34 FPC 930, the Commission, with two Commissioners dissenting, held that the District 2 pre-Policy Statement in-line level of 15¢ had escalated to 16¢ upon issuance of the Policy Statement; and in *Turnbull & Zoch Drilling Co.*, Op. 478, 34 FPC 1001, the Commission, with one Commissioner dissenting,[7] held, as it had in *Amerada*, that the District 4 pre-Policy Statement in-line level of 15¢ had escalated to 16¢ upon issuance of the Policy Statement. In each of the three September 1965 Opinions, the Commission justified the 1¢ rise in in-line level, as it had in *Amerada*, by reference to the prices contained in the contracts before the Commission for decision, on the prices contained in temporary certificates, and the guideline levels contained in the Policy Statement. And in each of the three cases, as in *Amerada*, the Commission deferred for later action the question of whether to order refunds of excess amounts collected under temporary certificates during the pendency of the applications.

Appeals from these three Opinions were taken by both the consumer and the producer interests. The first appeals of *Hawkins* and *Sinclair* were filed in the District of Columbia Circuit, and the first appeal of *Turnbull & Zoch* was filed in the Fifth Circuit. On February 7, 1967, the District of Columbia Circuit, in a decision written by Chief Judge Bazelon, reversed the Commission's 1¢ post-Policy Statement escalation for Districts 2 and 3. That opinion—*Public Service Commission of New York* v. *F.P.C.*, D.C. Cir. Nos.

[7] Commissioner Black, while noting his dissatisfaction with the majority's reasoning, apparently felt himself bound by his prior District 4 concurrence in *Amerada*; see 34 FPC at 1013.

19796 *et al.*—is appended to this petition as Appendix C, *infra,* pp. 7a-39a.

The *Turnbull & Zoch* appeal is awaiting decision in the Fifth Circuit on oral argument held November 15, 1966.

For all areas other than the Texas Gulf Coast, the Commission has applied the same in-line level to post-Policy Statement contracts as to pre-Policy Statement contracts, although it may be noted that the Commission's action in doing so in the southern Louisiana area is presently being challenged by the producers in the Tenth Circuit—*Union Texas Petroleum,* Op. 436, 32 FPC 254 (1964), appeal pending, No. 7912, 10th Cir., Oct. 9, 1964.

REASONS FOR GRANTING THE WRIT

This case presents two important issues as to the scope and proper exercise of the Commission's power to impose price and refund conditions upon the grant of permanent authority to sell gas in interstate commerce. On both issues, the decision of the court below is in square conflict with decisions of the Court of Appeals for the District of Columbia Circuit, creating a wholly untenable regulatory situation for the Federal Power Commission. Further, on both issues the decision of the court below is inconsistent with the decisions of this Court, which both in their specific holdings and their general teachings make clear that the Natural Gas Act is designed to protect the consumer from excessive rates and charges by natural gas companies.

I. DETERMINATION OF THE IN-LINE PRICE

There is no dispute among the parties that the Federal Power Commission may certificate new sales of gas in interstate commerce only where the proposed

price is "in-line". "The question is," as Judge Bazelon noted in the *Hawkins-Sinclair* appeal,[8] "in line with what?" (App. C, *infra,* p. 18a). What the dispute comes down to is this: The producers, the majority of the Commission, and the court below believe that new sales should be certificated at prices that are in line with current, essentially unregulated market levels, as measured by the prices currently being negotiated for proposed sales, the prices contained in *ex parte* temporary certificates, and the guideline prices contained in the Commission's Policy Statement. Petitioners, the Examiner, the Commission Staff, the dissenting Commissioner,[9] and the Court of Appeals for the District of Columbia Circuit in *Hawkins-Sinclair* believe that new sales should be certificated at prices that are in line with existing prices which have been tested by the regulatory process, *i.e.,* prices which have previously received permanent certification following hearing, and which are not suspect because they are under judicial review or otherwise.

The difference between the two approaches is demonstrated in the Commission and court opinions in this case. In dissenting from the original determination of 16¢, Commissioner Ross pointed out (J.A. 392; 31 FPC at 644):

> "The principal error of the majority is found on page 14 [J.A. 373; 31 FPC at 634] where it lists those contracts on which it bases its in-line conclusion. Of the 38 contracts listed having prices

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[8] *Public Service Commission of New York* v. *F.P.C.,* D.C. Cir. Nos. 19796 *et al.* (February 7, 1967).

[9] And also one member of the *Amerada* majority, see note 6, *supra.*

> in excess of 15¢, 36, or about 95 percent, *are the very contracts whose price is being investigated in this case.* This type of bootstrap rationalization is legally indefensible." (Emphasis in original.)

The court below, in approving the Commission's standard, held (FPC Pet. 28):

> "An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections to them."

Commenting on the Tenth Circuit's standard, Judge Bazelon stated (App. C, *infra,* p. 28a):

> "Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need."

Indeed, as Judge Bazelon correctly points out (App. C, *infra,* p. 30a), the very purpose of Section 7 negatives the Tenth Circuit's current market price approach:

> "The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current condi-

> tions, unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. . . . But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price without attempting to justify the decrease in consumer protection."

Judge Bazelon also observed, as Judge J. Skelly Wright had in an earlier in-line appeal,[10] that maintaining an in-line price at the level fixed in earlier cases in no way results in a price freeze,[11] since under Section 4 of the Act a dissatisfied producer can file and, within six months at most, make effective his original contract price; this higher price is, however, subject to refund

> "if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices." (App. C, *infra,* p. 22a, footnote omitted.)

Thus, while it is true that the position urged by petitioners and required by the D.C. Circuit's decision (App. C, *infra,* pp. 30a-31a)

> "may cause the in-line price to be frozen temporarily during the interim period between sales of

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[10] *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677, at 679 (D.C. Cir. 1963). The Tenth Circuit expressed its disagreement with Judge Wright's formulation (FPC Pet. 28-29).

[11] The difference between freezing the in-line price—*i.e.*, the initial price at which a certificate is issued—and freezing the effective price the producer may collect should be noted. No party in this proceeding has suggested freezing the effective price.

> gas and the rate determination under § 4 or § 5 of the Act, [t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing." [12]

We submit that the analysis and reasoning of the D.C. Circuit's decision in *Hawkins-Sinclair* lays bare the error of the Tenth Circuit's decision in *Amerada*. Further, the sharp and irreconcilable conflict between the decisions of the two circuits on this issue requires an early resolution by this Court.

The specific in-line issue here presented has not previously come before this Court because in all prior cases the Commission (a) did not rely on suspect prices in arriving at an in-line price, and (b) after once determining an in-line price for an area, maintained that price in subsequent in-line proceedings. Thus, in the southern Louisiana area, the Commission first found an in-line price for the 1957 contracts involved in the remanded *Catco* case by reference to the level of permanently certificated prices in 1954-56, *Continental Oil Co.*, Op. 351, 27 FPC 96 (1962). Subsequently, it maintained that level for 1958-59 contracts in *Placid Oil Co.*, Op. 398, 30 FPC 283 (1963), *aff'd, United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965); for contracts dated through 1962 and 1963 (well after issuance of the Policy Statement) in *Union Texas Petroleum*, Op. 436, 32 FPC 254,[13] and *Superior Oil Co.*, Op. 437, 32 FPC 241 (1964); and it regards the same in-line level applicable to contracts entered

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[12] See note 11, *supra*.

[13] Producer appeals from Opinion No. 436 are presently pending in the Tenth Circuit, *Pan American Petroleum Corp.* v. *F.P.C.*, 10th Cir. No. 7912, argued Sept. 14, 1966.

into today, FPC 1966 Annual Report, p. 129; Order No. 336, adding 18 CFR § 2.63, 28 Fed. Reg. 2844 (1967).

In sustaining the Commission's refusal to elevate the southern Louisiana in-line level, this Court, in its most recent discussion of initial-price problems, stated, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 at 227:

> "Consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, *no longer subject to judicial review or in any way 'suspect'.*" (Emphasis supplied.)[14]

It may be significant that the court below, when quoting from this Court's *Callery* opinion, ended its quote after "certificates", omitting entirely the qualification that suspect prices were not useful in in-line comparisons.

The only producing area for which the Commission, after first finding a given price level to be "in-line", has in a subsequent proceeding elevated that level is the Texas Gulf Coast, where it has followed the add-a-penny procedure on four separate occasions. Of those four determinations, one has been sustained (by the court below in the instant *Amerada* District 4 proceeding), two have been reversed (by the D.C. Circuit in the *Hawkins* District 3 proceeding and the *Sinclair* District 2 proceeding), and one is pending (before the

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[14] See also 382 U.S. at 229:

> "The 'in-line' price of 18.5 cents is supported by the contract prices in the south Louisiana area *that were not 'suspect'* . . . ." (Emphasis supplied.)

Fifth Circuit in the *Turnbull & Zoch* District 4 proceeding).

Though only an interim regulatory device, in-line pricing remains an important issue so long as just and reasonable rates have not been fixed by the Commission. It may be noted that, under its area rate-making approach, the Commission has thus far fixed just and reasonable rates for only one area—the Permian Basin—which covers about 10% of natural gas production. For the remaining 90% of natural gas sold in interstate commerce (and indeed, even for Permian, for the Commission's Permian order has been stayed pending appeal), the only real regulatory control has been in-line pricing. Hence, in-line procedures remain of continuing and vital importance in the administration of the Natural Gas Act.

II. THE REFUND ISSUE

A. Background—The Collection of Out-of-Line Prices Under Temporary Certificates

Section 7(c) of the Natural Gas Act provides that before any person may commence a sale of natural gas in interstate commerce he must obtain a certificate of public convenience and necessity from the Federal Power Commission; the section further provides that a certificate shall issue only after a hearing on the application, and that the Commission shall afford notice of such hearing to the interested public. It has been through the operation of these provisions that the present petitioners have been able, over the years, to challenge proposed initial prices which appeared to be inconsistent with the public interest because they were out of line or were potentially excessive, and it has been through the operation of these provisions that

petitioners have been able to secure judicial relief, in *Catco* and the subsequent cases, when the Commission has certificated out-of-line prices.

At about the time that petitioners were first challenging the FPC's unconditional certification of out-of-line prices, the Commission began the widespread practice of issuing "temporary" certificates as a matter of routine to every producer-applicant who requested one —and in time virtually every producer-applicant included a request for one with his application for permanent certification. Although the statute seems quite clearly to indicate that temporary certificates are to be issued only in cases of emergency to the public,[15] *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334 (1st Cir. 1953), the Commission in the late 1950's determined that such certificates should be issued for the benefit of the producers, and it accepted, as falling within the definition of "emergency", a producer claim of economic detriment resulting from inability to commence a sale pending the conclusion of the statutorily required hearing.

While the Commission's power to issue temporary certificates under such circumstances appeared rather dubious, the consumer interests—to the extent they knew of such temporaries (and it should be emphasized that temporary certificates are issued *ex parte* by letter from the Secretary, and do not appear in the FPC's regular list of orders)—were at first not unduly con-

[15] A proviso to Section 7(c) reads:

> "*Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ."

cerned, since it seemed clear that there could be no irrevocable injury to the consumer from temporary certification: Prior to its August 1962 *Skelly* decision, the Commission had uniformly and repeatedly held that any error in granting temporary certification could and would be corrected by a refund order on permanent certification. *El Paso Natural Gas Co.,* Op. 335, 23 FPC 369 at 378 (1960), affirmed, *Texaco Inc.* v. *F.P.C.,* 290 F. 2d 149 (5th Cir. 1961); *Socony Mobil Oil Co.,* 26 FPC 532 at 533 n. 1 (1961), 27 FPC 347 (1962); *Texaco-Seaboard, Inc.,* 27 FPC 15 and 482 (1962); *Continental Oil Co.,* Op. 351, 27 FPC 96 (1962).[16] Moreover, because the prices contained in temporary certificates were by definition subject to further Commission review, they could not be (and prior to this case had not been) used in determining the in-line level for other sales.

In *Skelly,* however, the Commission broke with precedent and held, in effect, that a temporary certificate, even if erroneous, did create permanent rights, for it refused to order refunds of that portion of the moneys collected under temporary certificates which was found, upon permanent certification, to be in excess of the in-line level; it attempted to justify its result on the ground that the temporary certificates contained no express refund condition. The present petitioners, who were interveners in *Skelly,* appealed that ruling to

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[16] In requiring refunds of excess amounts collected under a temporary certificate which contained no express refund requirement, the Commission stated (27 FPC 96 at 110) that the statutory language under which temporaries are issued "appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

the D.C. Circuit; at the same time, a second appeal, challenging the FPC's power to issue temporary certificates, was filed in the same court, and the two appeals were decided by the same panel in January 1964. In those decisions, the D.C. Circuit, while sustaining the FPC's power to issue temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 327 F. 2d 893, held that the Commission was legally obligated to protect the consumer against excessive, out-of-line prices collected under temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242; specifically, the court held that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts.

Although the Commission's decision here was issued after the D.C. Circuit's *Skelly* decision, the Commission declined to order refunds of the excess amounts, and instead deferred the issue. On appeal, the present petitioners challenged the Commission's failure to order refunds consonant with the D.C. Circuit's opinion in *Skelly;* the producers, on the other hand, asserted that the D.C. Circuit's opinion was incorrect, that the FPC had no power to require refund of the excess amounts collected under the temporary certificates, and that as a result the Commission had no power to sever the issue out for later determination. The court below decided in favor of the producers.[17]

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[17] On July 27, 1966—three months after oral argument in the court below—the Commission decided the refund issue it had severed for later disposition at the time of its original March 1964 *Amerada* opinion. The refund decision—*Amerada Petroleum Corp.*, Op. 501—has been appealed to the Tenth Circuit.

B. The Issue Is a Recurring One in the Administration of the Natural Gas Act.

Although the Commission has recently taken action which will prevent recurrence of this problem as to temporary certificates issued after February 1967,[18] there are hundreds of temporary certificates, under which many millions of dollars in excess rates have been collected, that will be affected by the decision of the court below.[18a]

C. The Decision Below Is in Square Conflict With the Decision of the D.C. Circuit in the Skelly Appeal.

There can be no question that the decision of the court below is in square and irreconcilable conflict with the decision of the D.C. Circuit in the *Skelly* appeal—*Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242 at 248-50 (1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963. Although the Tenth Circuit suggested that "the situation in the case at bar differs from that presented to the District

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[18] By Order No. 336, 28 Fed. Reg. 2844, the Commission added § 2.63 to its Rules and Regulations, 18 CFR § 2.63, which provides as follows:

> "For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended (§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower . . . ."

[18a] The Commission estimates that the instant *Amerada* proceeding involves $1.2 million in refunds, seven similar proceedings involve $10.3 million, and 579 other pending contracts involve an indeterminate, but "undoubtedly large," refund potential, FPC Pet. 8.

two opinions indicates that the difference is insubstantial. Thus, the reservations contained in the *Skelly* temporary certificates, which the D.C. Circuit held of Columbia Circuit [in *Skelly*]", a comparison of the "amply support authority for conditioning the permanent certificates by a refund requirement", 329 F. 2d at 249-50, were found by the Tenth Circuit to be "routine, boilerplate language" not justifying refund (FPC Pet. 38). And the Tenth Circuit's holding:

> "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition" (FPC Pet. 39)

is irreconcilable with the holding of the D.C. Circuit:

> "The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. *The power does not depend upon an explicit refund provision in a temporary certificate.* Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates." 329 F. 2d at 249. (Emphasis supplied.)

The Commission is thus placed in an intolerable position, for whichever way it decides the refund issue, it

runs a considerable risk that its action will be reversed, either by the D.C. Circuit, as in *Skelly,* or by the Tenth Circuit, as here.[19]

CONCLUSION

Sound administrative procedure requires that the Natural Gas Act be applied uniformly throughout the circuits. Even more important, the Act's basic purpose to protect the consumer against excessive rates and charges requires that the decision below be reviewed and vacated. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 1967

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[19] And it may be noted that when the Commission acted responsively to the D.C. Circuit's *Skelly* remand, its order directing refunds was appealed by the producers to the Tenth Circuit where it now pends, that court having denied a motion to transfer to the D.C. Circuit.

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

SKELLY OIL COMPANY,
SUN OIL COMPANY,
CALLERY PROPERTIES, INC.,
SHELL OIL COMPANY,
PAN AMERICAN PETROLEUM CORPORATION,
SUPERIOR OIL COMPANY,
HUMBLE OIL & REFINING COMPANY,
W. S. KILROY, et al., and KILROY PROPERTIES, INC.,
H. L. HAWKINS & H. L. HAWKINS, JR.,
PLACID OIL COMPANY, et al.,
INTERVENORS

No. 19,800

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

MONSANTO COMPANY,
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD, et al.,
EDWIN M. JONES OIL COMPANY,
SHELL OIL COMPANY,
H. D. BRUNS & MPS PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY,
LAMAR HUNT,
INTERVENORS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH JUDICIAL CIRCUIT
SITTING AT DENVER, COLORADO

Nineteenth Day, November Term,
Friday, December 9th, 1966.

Present: Honorable Jean S. Breitenstein, Circuit Judge, and other officers as noted on the 21st day of November, 1966.

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

7781-8298-8311-8312-8313-8314-8315-8316-8317-8358-8359-8360-8362

SUNRAY DX OIL COMPANY ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions to Review Orders of the Federal Power Commission.

These causes came on to be heard on petitions to review orders of the Federal Power Commission and motions to adduce additional evidence and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the motions to adduce additional evidence are severally denied, and the causes remanded for further proceedings consistent with the opinion of the court.

A true copy as of record,

TESTE:

WILLIAM L. WHITTAKER
William L. Whittaker
Clerk

(SEAL)

APPENDIX B

NATURAL GAS ACT

SECTION 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleadings by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company

affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company, making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c]

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any

State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U. S. C. § 717(a)]

SECTION 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Providing, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that

time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceeding, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

No. 19,919

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

LAMAR HUNT,
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD, et al.,
EDWIN M. JONES OIL COMPANY,
INTERVENORS

No. 19,941

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 19,957

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petitions to Review Orders of the
Federal Power Commission

Decided February 7, 1967

Mr. Morton L. Simons, with whom *Mr. Kent H. Brown* was on the brief, for petitioner in Nos. 19796 and 19800.

Mr. Joseph C. Johnson, of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of court, with whom *Messrs. Bruce R. Merrill* and *Thomas H. Burton* were on the brief, for petitioner in No. 19941.

Mr. Homer J. Penn for petitioner in No. 19957. *Messrs. Herbert W. Varner* and *William T. Kilbourne, II,* were on the brief for petitioner in No. 19957.

Mr. Joel Yohalem, Attorney, Federal Power Commission, with whom *Messrs. Richard A. Solomon,* General Counsel, and *Howard E. Wahrenbrock,* Solicitor, Federal Power Commission, were on the brief, for respondent.

Mr. Sherman S. Poland, with whom *Mr. Donald B. Robertson* was on the brief, for intervenor Skelly Oil Company in No. 19796, argued on behalf of all intervenors. *Mr. Oliver L. Stone* was on the brief for intervenor Shell Oil Company. *Mr. Richard F. Generelly* was on the brief for intervenors Callery Properties, Inc., H. L. Hawkins, H. L. Hawkins, Jr., and Monsanto Company. *Mr. J. Evans Attwell* was on the brief for intervenor W. S. Kilroy, et al. *Mr. James K. Schooler* was on the brief for intervenor Humble Oil & Refining Company. *Messrs. Carroll L. Gilliam* and *Philip R. Ehrenkranz* were on the brief for intervenor Pan American Petroleum Corporation. *Messrs. Bernard A. Foster, Jr.* and *Donald B. Robertson* were on the brief for intervenors Mrs. James R. Dougherty, et al., Edwin M. Jones Oil Company and W. A. Stockard, et al. *Messrs. Morton L. Simons* and *Bertram D. Moll* also entered appearances for petitioner in No. 19919. *Mr. Robert E. May* also entered an appearance for intervenor Skelly Oil Company. *Mr. Robert W. Henderson* also entered an appearance for intervenor, Lamar Hunt.

Before Bazelon, *Chief Judge,* Wilbur K. Miller, *Senior Circuit Judge,* and Tamm, *Circuit Judge.*

Bazelon, *Chief Judge:* We are to review a Federal Power Commission (FPC) order certificating sales of natural gas from producers to interstate pipelines. The sales were certificated in the *Hawkins* (Texas Railroad

District No. 3)[1] and *Sinclair* (Texas Railroad District No. 2)[2] proceedings, which are consolidated here.

The New York Public Service Commission challenges the certificates on three grounds. First, there was no showing of public need for the gas. Second, the "in-line" price was too high. And third, the FPC erroneously postponed deciding whether the producers should be required to refund amounts in excess of the in-line level which were collected under a temporary certificate. Superior and Continental (producers) challenge the in-line price as too low. Superior claims also that the FPC set too high an interest rate on funds which would be retained by the producers in excess of the amount allowed by the permanent certificates. The intervenors support the FPC's determinations, although some of them think that the in-line price should have been higher.

I

The Public Need for the Gas

We face some confusion about whether New York properly raised the issue of public need. At the prehearing conference in the *Hawkins* proceeding, New York limited the issue to whether or not the *pipelines* needed the gas.[3] However, in its exceptions to the Examiner's initial decision New York said, "In view of (a) the absence of any evidence of public need for the gas and (b) the many indications that pipelines in the Gulf Coast area are presently suffering from take-or-pay problems,[4] the applica-

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[1] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.* Docket Nos. G-18077, *et al.*

[2] *Sinclair Oil & Gas Company, et al.* Docket Nos. G-16760, *et al.*

[3] H.A. (*Hawkins* Joint Appendix) 7-19.

[4] New York claimed that the pipelines were obligated to take or pay for more gas than they could use. [Footnote added.]

tion should be denied."[5] This raised the issue of the *public's* need for the gas. New York used the take-or-pay problems to alert the FPC to a potentially harmful situation and obligate it to give reasons why, in spite of those problems, the sales should be certificated.[6] New York reiterated its position in a petition for rehearing before the FPC.[7]

In *Sinclair,* New York raised the issue in the same terms as in the *Hawkins* proceeding.[8] And again, after the FPC refused to consider the issue, New York repeated its contentions in a petition for rehearing.[9] Since New York presented the issue of public need in its petition for rehearing in both the *Hawkins* and *Sinclair* proceedings, our review is authorized by Section 19(b) of the Natural Gas Act.[10]

The most obvious element of public necessity is the demand for the gas. In several cases decided before CATCO, the existence of an unsatisfied market was considered of great importance. For example, in *Oklahoma Natural Gas Co.* v. *Federal Power Commission*[11] the court allowed the

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[5] H.A. 268.

[6] This argument is analogous to the argument that the FPC must give reasons why a certificate should be granted even though the price is out of line. The out-of-line price alerts the FPC to the potentially harmful situation. See *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378 (1959) (CATCO).

[7] H.A. 311-12.

[8] S.A. (*Sinclair* Joint Appendix) 198.

[9] S.A. 243-44.

[10] 15 U.S.C. § 717r (b) (1964).

[11] 103 U.S.App.D.C. 256, 257 F.2d 634, *cert. granted,* 358 U.S. 877 (1958), *cert. dismissed,* 358 U.S. 948 (1959).

need in the Chicago market to outweigh even considerations of the price of the gas. And in *United Gas Improvement Co.* v. *Federal Power Commission*,[12] because the demand for the gas was shown to be great, the court did not insist that the FPC regulate the initial price.[13]

Since these cases were decided, the Supreme Court has held, in CATCO, that the initial price is extremely important. But CATCO does not suggest that the public's need for the gas is irrelevant. Indeed, the Court seems to have imposed on the producer the burden of proving public need before certification. In part, the Court reversed the Commission's certification in CATCO because there was no "support whatever in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas.' "[14]

But market demand is not the only relevant factor. In the *Transco* case,[15] the question was whether the FPC, "through its certification power, may prevent the waste of gas committed to its jurisdiction."[16] The Supreme Court said "no one [disputed] that natural gas is a wasting resource and that the necessity for conserving it is paramount."[17] The dispute was whether the "public conven-

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[12] 269 F.2d 865 (3d. Cir.), *vacated sub nom. Public Service Commission* v. *Federal Power Commission*, 361 U.S. 195 (1959).

[13] See also *Department of Conservation* v. *Federal Power Commission*, 148 F.2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), in which the court allowed the need for the gas to outweigh evidence that the gas was going to be put to an inferior use.

[14] *Supra* note 6, at 393.

[15] *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961).

[16] *Id.* at 8.

[17] *Ibid.*

ience and necessity," referred to in § 7(e) of the Natural Gas Act, included considerations of conservation, or whether the FPC was precluded from considering that factor. In affirming the Commission's action, the Court decided that conservation was relevant to public convenience and necessity. *Transco* was a pipeline certificate case, and the instant case is a producer certificate case. But pipelines and producers are certificated under the same statute, and, at least without strong evidence, we should not say that conservation is relevant in one case and not in the other. The public's interest in conserving gas is no less when the applicant for a certificate of public convenience and necessity is a producer.

The parties do not explicitly deny the relevance of market demand and conservation, but we are asked to disregard the issue of public need for four other reasons. First, it was not properly raised below. We have already dealt with that argument. Second, the public need for the gas should be determined in a pipeline certificate or pipeline rate case, not in a producer certificate case. Third, the FPC can postpone consideration of public need until it completes its pending rule-making proceeding on the problem of take-or-pay contracts. And fourth, "because of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for future, even though the supplies may be slightly in excess of their present-day needs." [18] We will deal with the last three contentions in turn.

1. According to New York, the issue of public need should not be decided only in a pipeline certificate or rate case. New York argues that if the gas is sold to a pipeline which is unable to use it, and if the pipeline must either take the gas or pay for it nonetheless, then

[18] H.A. 280.

the loss sustained by the pipeline will be reflected in the price charged to the public utility and ultimately in the price charged to the consumer. The FPC could eliminate this problem by ruling that the pipeline's investment in the unused gas was "imprudent" and refusing to allow the pipeline to add its cost to the rate base. However, the FPC has cited no case in which the cost of unused gas was eliminated from the rate base. To the contrary, there is some indication that the FPC may be allowing at least part of the loss to be shifted to the consumer.[19] Indeed, it would seem difficult for the FPC first to certificate a sale to a pipeline and then to claim that the pipeline's investment in the gas was imprudent.

Regardless of how the FPC uses it "imprudent investment" doctrine, there is another reason why the public's need for the gas must be considered in a producer certification. As we have indicated, the FPC must prevent waste of natural gas. One of the most important ways is to control and limit the end uses of gas.[20] The FPC must compare various uses and determine which ones are more economically necessary. If the proposed sale is to a consumer who will use the gas in an economically "inferior" way then the sale is not certificated. Of course, to do the job properly the FPC must consider *all* alternative uses.[21] It recognizes this responsibility in pipeline certificate cases.[22] But if it refuses to consider the issue

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[19] See *United Gas Pipe Line Co.*, 31 FPC 1180, 1191-92 (1964), and *United Gas Pipe Line Co.*, 32 FPC 1515, 1519 (1964).

[20] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15, at 8.

[21] "[Section] 7(e) requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Co.* v. *Public Service Commission*, *supra* note 6, at 391. [Emphasis added.]

[22] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15.

in producer certificate cases and waits for pipeline cases, some of the alternatives will already have been eliminated. In the pipeline case the FPC can direct the gas towards one rather than another of the pipeline's customers but without considering the customers of other pipelines which might have bought the gas. Thus, the gas may go ultimately to consumers whose use will be less economically beneficial than the use of other potential purchasers.

Because the FPC refused to consider the issue of need, this record does not indicate whether or not this gas has been wasted.[23] However, such wasting is a possible result of the alleged oversupply situation of some of the pipelines here.[24] The possibility that gas may be wasted requires that the FPC determine the issue of need *before* the initial sale to a pipeline. Otherwise it may be too late to protect the public interest.[25]

2. The FPC argues that "insofar as there may be any [take-or-pay] problem for [the pipelines in the instant case], it is one not peculiar to them and may therefore be resolved . . . by the Commission's reservation of the matter for consideration in the pending rulemaking proceeding on that subject . . . ." [26] As we have noted, though, the take-or-pay problem does not exhaust the considera-

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[23] We do not know whether anyone else could have taken the gas, or, if so, whether he served markets which would differ from the markets served by the pipelines here.

[24] There is a suggestion that the gas involved in this case was obviously needed because some of it has already been consumed. The issue of need, however, is not decided simply because someone will consume the gas. The real questions are whether the consumer was forced, or will be forced, to pay more for the gas because of the pipeline's poor take-or-pay situation and whether the gas could have been put to a superior use.

[25] See *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S.App.D.C. 113, F.2d 741 (1956).

[26] Brief for Respondent, p. 29.

tions relevant to an informed decision about the public's need for the gas. It is unlikely that any decision the Commission makes in its rule-making proceeding would deal with the entire "need" issue. The rule-making proceeding on which the FPC relies has been pending for five and a half years,[27] and we do not know when a decision will be reached. We can only speculate about what that decision will be and how it will apply to the question of public need. We think such an uncertain proceeding should not excuse the Commission from its present responsibilities.[28]

3. The FPC's last argument is that the "nature of the gas business and the obligation of pipeline companies to the consuming public" sometimes require a poor take-or-pay situation.[29] If this means that other considerations may outweigh the pipeline's poor take-or-pay situation, we agree. And these considerations may also outweigh the considerations of conservation inherent in the case. But there is no evidence in the record which indicates what these considerations are or how they are relevant to this certification. If public convenience and necessity requires this certification, this must appear from something more than the FPC's broad and unsupported statement about

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[27] Docket No. R-199, 26 Fed. Reg. 4615 (May 22, 1961).

[28] See *Public Service Commission* v. *Federal Power Commission*, 117 U.S.App.D.C. 287, 292-93, 329 F.2d 242, 247-48, *cert. denied sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963 (1964). A day before this opinion was issued, we were informed that the FPC completed its rule-making proceeding on January 18, 1967. The new rule does not affect our decision to remand this case for a determination of public need. That rule is subject to further review. In any event, we think the FPC should decide, in the first instance, how the new rule relates to the issue of whether the public needs the gas involved in this case. Therefore, on the remand we order herein, the FPC will make that determination according to the principles stated in this opinion. See discussion following note 30 *infra*.

[29] H.A. 280.

the "nature of the gas business" in a case where the FPC thought the issue irrelevant.[30]

Although we remand this case so that the FPC can consider the issue of public need, we recognize an obvious tension between the statutory requirement that it do so and administrative feasibility. The public convenience and necessity includes many considerations, but if there is to be any effective certification of producers the FPC must sometimes stop short of the ideal.[31] It is evident, too, that the FPC must have great latitude in its choice of procedures. We are not demanding that the FPC hold a long and complex hearing in each of its many producer application cases. But it does not seem too difficult to have the producer's customers or the pipeline's customers testify about the take-or-pay situation.[32] Regarding the broader aspects of the "nature of the gas business" or of conservation, the FPC may consider studies of its staff. It may, after study, issue policy statements. These studies or statements may be relevant to large geographic areas, or perhaps to the whole gas industry. Then it would not be necessary to relitigate need in each case; the FPC need

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[30] In CATCO the Supreme Court also rejected an unsupported statement about the public need. *Supra* note 6, at 393.

[31] *Cf. United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223 (1965). *Callery* does not apply directly though. There, no one doubted the need for the gas. The dispute was over the price. The longer it took to set the price, the more the consumer was hurt. Understandably, the Supreme Court wanted the Commission to ack quickly and efficiently. The entire purpose of the Act is to protect the consumer. Here, New York claims that this sale should not be certificated at all, no matter at what price and no matter how quick the procedure. It is counter-productive to streamline procedure when the effect is to prevent the Commission from considering the possibility that the sale itself would not be in the public interest.

[32] Or perhaps the Commission can rely upon a previously decided producer or pipeline certificate case if the decisions there are relevant to the applications pending before the Commission.

only show that the broad statement or study covers the particular certification before it. In short, we do not now prescribe any particular method for deciding need. Nor is our discussion of what public need means exhaustive. We decide only that when a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a permanent certificate to a producer.[33] "[A] certificate shall be issued . . . authorizing the . . . sale . . . if . . . the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."[34]

II

The In-Line Price

The second major dispute in this case concerns the FPC's determination of the in-line price. Since the CATCO decision, the FPC has been granting permanent certificates of public convenience and necessity only if the price of the gas is in-line. The question is, in line with what? Judging from these and other FPC proceedings, the "line" is determined as follows: First the Commission chooses a time period and a geographical area which it considers relevant[35] and lists all the prices at

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[33] *Cf. Federal Power Commission* v. *Texaco*, 377 U.S. 33, 42-44 (1964), and *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 525-26 (1964).

[34] 15 U.S.C. § 717f (e) (1964).

[35] Here the area for the *Hawkins* proceeding was Texas Railroad District No. 3, and the area for the *Sinclair* proceeding was Texas Railroad District No. 2. In both proceedings there were two relevant time periods—in *Hawkins* from January 1, 1958, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to January 1, 1964, (post-Policy Statement period), and in *Sinclair* from January 1, 1957, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to March 10, 1964 (post-Policy Statement period).

which gas was sold at that time and in that area. Then it eliminates prices which are "suspect" either because they are presently under litigation or Commission review or because they are similar to a price under a cloud.[36] When the price array is completed the FPC makes several calculations, for example, the average price, the median price, the weighted average price, and the price at which substantial volumes of gas flowed in interstate commerce. The FPC adjusts some of these prices by assigning differing weights to the various prices which form the price array. At least one Commissioner in our case gave some weight also to a guideline price announced first in 1960 and subsequently revised.[37] The Commission considers these weights and the adjustments, and then picks a price.[38] Here the Commission set the in-line price at 15¢ per Mcf for District No. 2 during the period before the Policy Statement (September 28, 1960) and at 16¢ for the post-Policy Statement period.[39] For District No. 3, the prices were 16¢ and 17¢ respectively.

The petitioners have many disagreements with what the FPC did in this case. Continental and Superior think the Commission should have given more weight to certain 20¢ sales which were permanently certificated, to sales which were temporarily certificated, and to contract prices even before these prices are tested in

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[36] See, *e.g.*, *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 (1961).

[37] See Commissioner Bagge's concurring opinion in *Hawkins*. H.A. 297.

[38] The proceedings in this case provide some examples of the Commission's methods. See the appendix attached to this opinion.

[39] The pre- and post-Policy Statement periods are described fully in note 35 *supra*.

any kind of certificate proceeding.[40] They also claim that the Commission erroneously considered certain sales at 14¢ and less, erroneously excluded intrastate sales, and erroneously used estimated rather than actual volumes when calculating weighted average prices. In short, they claim that the Commission acted arbitrarily and without any recognizable standards.

New York claims that the FPC should have given no weight to contract prices or to sales made pursuant to temporary certificates, and that it erroneously considered certain permanently certificated prices. New York says these permanently certificated prices were incorrectly determined and therefore should not be allowed to affect subsequent in-line prices.

To properly weigh these claims we must understand the purpose of in-line pricing.

In-Line Pricing

The concept of an in-line price is an artificial one created by the Supreme Court, the Courts of Appeals, and the Commission for the sole purpose of protecting the consumer. Before the concept existed, the FPC usually proceeded in the following way. A producer who wanted to sell gas in interstate commerce applied to the Commission for a certificate of public convenience and necessity under § 7 of the Act. When the certificate was granted, the producer-seller and the pipeline-buyer executed the sale at a price which they had already negotiated. If that price was too high, the FPC, either on its own motion or acting on the complaint of an interested party, could institute proceedings under § 5 of the

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[40] Their claim that the Commission disregarded these prices cannot be based on the record in this case. See, *e.g.*, S.A. 226 and H.A. 285-86 quoted in the appendix *infra*. The producers' claim is reduced to the contention that not enough weight was given.

Act to determine the "just and reasonable" price, after which the producer was forced to lower his price accordingly. However, since § 5 does not provide for refunds, the producer was allowed a "windfall" (with a consequent "squall" for the consumer) during the period between commencement of the sales and the conclusion of the hearing under § 5.[41] Section 5 hearings were long and complicated, and the windfall could be quite large. The ordinary protections of the market place did not exist in this regulated monopoly industry. The producer, of course, was interested in extracting the highest price from the buyer. But the buyer did not have an equal interest in keeping the price down because the price he paid became part of his rate base and was ultimately paid by the consumer.[42] Presumably the consumer did not have any choice except to buy the fuel at the price which was set.[43]

The procedure after the invention of in-line pricing changed in one significant way. Now, when the FPC grants a certificate of public convenience and necessity, a price condition is usually attached. A dissatisfied producer who wants to sell at a higher price can file a new rate schedule under § 4 of the Act subject to his contract with the pipeline.[44] These rates become effective after thirty days unless challenged by the FPC. Even if challenged, the new rates become effective after five months

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[41] *Atlantic Refining Co.* v. *Federal Power Commission, supra* note 6, at 390.

[42] *Atlantic Refining Company* v. *Federal Power Commission,* 115 U.S.App.D.C. 26, 28 at n. 11, 316 F.2d 677, 679 at n. 11, (1963).

[43] *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F.2d 133, 135 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.,* 368 U.S. 823 (1961).

[44] *Cf. Texaco* v. *Federal Power Commission,* 290 F.2d 149, 156 (5th Cir. 1961).

if the Commission has not completed its "just and reasonable" determination by that time. Eventually, then, the producer may charge whatever price he wants.[45] However, by filing under § 4, the producer becomes subject to payment of refunds if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices.[46]

The Use of Contract Prices

From the description of in-line pricing it is evident that the FPC cannot use the prices at which producers and pipelines contract as a basis for setting the price. The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control.[47]

One Court of Appeals has viewed the Commission's reliance on contract prices as the reason for the CATCO opinion.

> [W]e perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the [follow-

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[45] The Commission may, however, impose a temporary moratorium on price increases. See *United Gas Improvement Co.* v. *Callery Properties, supra* note 31. A price moratorium was imposed in the instant case, but it is not before us on appeal.

[46] The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. *Atlantic Refining Co.* v. *Public Service Commission, supra* note 6, at 388.

[47] See *Atlantic Refining Company* v. *Federal Power Commission, supra* note 42, at 28, n. 11, 316 F.2d at 679, n. 11.

> ing] criticism . . .: that the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned,* that they had been bargained for at arm's length, or that they were not higher than a price someone else was then paying in the area.[48]

And this court has been wary of allowing the Commission to avoid its responsibility by relying on prices negotiated in the market place.[49]

The Use of Temporary Certificates and the Policy Statement

If the Commission relies on prices over which it has never exercised control, it effectively abdicates its responsibility to protect consumers. Although prices contained in temporary certificates are not completely without Commission control, neither are they subjected to thorough consideration. According to the statute, temporary certificates are granted only "in cases of emergency" pending determination of an application for a permanent certificate. Temporaries are granted in *ex parte* proceedings "without notice or hearing."[50] No record is made, so it is impossible for a court to know on what basis the Commission granted the certificate. Accordingly, standards on review are minimal. This court has upheld a temporary

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[48] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 43, at 135-36. [Emphasis in the original.] See also *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F.2d 147, 148 (5th Cir.), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.,* 366 U.S. 965 (1961).

[49] *Public Service Commission* v. *Federal Power Commission,* 109 U.S.App.D.C. 289, 291, 287 F.2d 143, 145 (1960), and *Public Service Commission* v. *Federal Power Commission,* 109 U.S.App. D.C. 292, 296, n. 4, 287 F.2d 146, 150, n. 4 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Public Service Commission,* 365 U.S. 880 (1961).

[50] 15 U.S.C. § 717f (c) (1964).

certificate although we admitted that the summary nature of the proceeding precluded us from passing intelligently upon the parties' contentions.[51]

Recently, though, the FPC has attempted to make temporary certification a more considered decision. In 1960 it promulgated a Policy Statement which included guideline prices beyond which it would not certificate sales, even temporarily. In theory, the Policy Statement could justify inclusion of temporary certificates in the permanent certificate price array, since the Policy Statement could provide some degree of intelligent control over temporary prices.

In fact, however, the Policy Statement has not had a curative effect. The FPC itself seems to give the Statement very little (and very ambiguous) weight. In its first statement, the FPC said that "these price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights."[52] When the State of Wisconsin petitioned this court to review the Policy Statement, the FPC moved for dismissal on the ground that the Policy Statement "does not modify the procedures under which certificates are granted. . . . It denies no rights and imposes no obligations."[53] We agreed and dismissed Wisconsin's petition for review.[54] The Commission has repeatedly

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[51] *Public Service Commission* v. *Federal Power Commission,* 117 U.S.App.D.C. 195, 327 F.2d 893, 897 (1964). See also *American Liberty Oil Co.* v. *Federal Power Commission,* 301 F.2d 15 (5th Cir. 1962). And see *Public Service Commission* v. *Federal Power Commission, supra* note 28, at 294, 329 F.2d at 249, in which this court characterized temporary certificates as being "without notice or hearing or mature consideration."

[52] 24 FPC 818, 819 (1960).

[53] *Wisconsin* v. *Federal Power Commission,* No. 16118 Motion to Dismiss, p. 2 (1961).

[54] *Wisconsin* v. *Federal Power Commission,* 110 U.S.App.D.C. 260, 292 F.2d 753 (1961).

held that the Policy Statement does "not purport to fix the 'in-line' price."[55] And recently the Commission characterized the guideline prices as being relevant only when "no protests or petitions to intervene [are] filed" in the certification proceeding.[56] In the instant case, only one Commissioner relied upon the guideline prices; two ignored them, and two felt that reliance upon the Policy Statement would be impermissible.

Further, we cannot know whether the guideline price actually controls temporary prices unless we know what the guideline price is based on. For example, it is conceivable that temporary certificates have significant influence upon the guideline price. If so, the guidelines do not control temporary prices. In any event, it is impossible to determine how the guidelines were set. The Commission listed a number of very general factors but was not specific about what the factors were or how they were considered. When asked, the FPC refused to disclose the basis for its determination.[57]

A still more persuasive reason for eliminating temporary prices from the permanent price array is the way their use may injure consumers. The effect may be a slow escalation of in-line prices: An in-line price is set; the guideline price is set somewhat higher; temporary certificates are granted at the guideline price; the new temporary certificates are used in determining a new in-line price, which will be higher than the first in-line

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[55] *Amerada Petroleum Corp.*, 29 FPC 171, 172 (1963), *Union Texas Petroleum*, 29 FPC 273, 275 (1963), *Union Texas Petroleum*, 29 FPC 733, 734 (1963).

[56] 30 Fed. Reg. 4670, 4671 (1965). See also *Amerada Petroleum Corp., supra* note 55, at 172 and *Union Texas Petroleum*, 29 FPC at 275 (1963).

[57] See, *e.g.*, Nos. 7781, *et al.*, *Sunray DX Oil Co.* v. *Federal Power Commission*, (10th Cir. Dec. 9, 1966), Op. pp. 15-19; *Amerada Petroleum Corp., supra* note 55.

price; the new in-line price raises the guideline price; and then the spiral begins again. Although, in fact, we cannot isolate so clearly the effect of the temporaries and the guidelines, there can be no doubt that an escalation has occurred, and in a manner similar to the process described.[58] This process contradicts CATCO's admonition to hold the line in the interim period between the sale of gas and the determination of just and reasonable rates. According to CATCO, one reason why the consumer needs protection during the interim period is that the period is often long.[59] Under the present administration of the in-line price doctrine the amount of protection for the consumer decreases as the length of the interim period increases. The longer it takes to determine a just and reasonable price, the higher the in-line price becomes, and the consumers' potential refund drops accordingly.

There is a final, and completely separate, reason why temporary prices should not affect the in-line price. The

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[58] In *Texaco Seaboard,* 29 FPC 593 (1963), the Commission found the Texas Railroad District No. 3 in-line price to be 16¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 17¢. 29 FPC 590 (1963). Now the Commission finds that the in-line price for District No. 3 has jumped to 17¢.

In *Hassie Hunt Trust,* 30 FPC 1438 (1963), the Commission found the District No. 2 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 30 FPC 1435 (1963). Now the Commission finds that the in-line price for District No. 2 has jumped to 16¢.

In *Skelly Oil Co.,* 28 FPC 401 (1962), the Commission found the District No. 4 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 28 FPC 441 (1962). Recently the Commission found that the in-line price for District No. 4 has jumped to 16¢. See *Sunray DX Oil Co.* v. *Federal Power Commission, supra* note 57.

[59] *Supra* note 6, at 389.

first court to discuss in-line prices held that prices which were suspect because they were under a cloud of court or Commission review could not be used in the permanent price array.[60] Since then almost every court,[61] including the Supreme Court,[62] has accepted the suspect price doctrine. The suspect price doctrine clearly includes temporarily certificated prices. Temporarily certificated prices may be, and often are, changed by the Commission. They are "subject to judicial review."[63] Prices that are so particularly subject to the hazard of change do "not provide a reasonably reliable basis upon which to predicate a price line."[64] And, acceptance of temporarily certificated prices has, in fact, had the effect of "creating a standard by which the questioned rates [are] judged."[65]

The producers argue, contrary to our holding, that temporarily certificated prices and contract prices must influence the in-line price. They rely on suggestions in some opinions that the line should "reflect current conditions in the industry."[66] This argument was adopted recently by the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*[67] which held that it is per-

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[60] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 36.

[61] See, *e.g.*, *Public Service Commission* v. *Federal Power Commission,* 109 U.S.App.D.C. 292, *supra* note 49 and *Public Service Commission* v. *Federal Power Commission, supra* note 28.

[62] *United Gas Improvement Co.* v. *Callery Properties, supra* note 31, at 227.

[63] *Ibid.*

[64] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 36, at 824.

[65] *Ibid.*

[66] See, *e.g.*, *ibid.*

[67] *Supra* note 57.

missible for the FPC to consider temporaries and contract prices.

However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated.[68] On this basis the court refused to apply the suspect price doctrine and approved the FPC's method of determining the in-line price. "[W]hen no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries."[69] In our case there is a substantial volume moving under permanent certificates.[70] We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.

Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need.

We are not suggesting, of course, that current conditions are never relevant to the FPC. In a § 4 or § 5 hearing the FPC considers current conditions in order to set a just and reasonable price. However, the courts have already rejected attempts to import standards relevant to § 4 and § 5 hearings into § 7 hearings. For example, in

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[68] *Supra* note 57, at Op. p. 24.

[69] *Supra* note 57, at Op. p. 26.

[70] See, *e.g.*, H.A. 282, 284-86, 299-300; S.A. 220, 223, 226-27.

Callery the producers tried to introduce economic and financial evidence, but the FPC disregarded it.[71] The Fifth Circuit reversed the Commission. In essence the court said that this evidence was relevant to current conditions in the industry, and that these conditions were relevant to the determination of the in-line price.[72] The Supreme Court rejected this argument summarily. "To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices."[73] In the recent Tenth Circuit case the producers tried to introduce the same kind of evidence. The court responded:

> The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity.[74]

We think this response, which is properly based on the logic of *Callery* and CATCO, is inconsistent with the same

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[71] See *Callery Properties* v. *Federal Power Commission*, 335 F.2d 1004, 1009 (5th Cir. 1964), for a description of the evidence.

[72] *Id.* at 1013.

[73] *Supra* note 31, at 227-28. In CATCO the Supreme Court had already recognized the difference between the standards of a § 7 and a § 4 or § 5 proceeding. "[T]he Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." *Supra* note 6, at 390.

[74] *Supra* note 57, at Op. pp. 14-15.

court's acceptance of temporaries and contract prices. If the courts and the FPC will not allow consideration of evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions.

The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. For example, in a particular case, the FPC may feel that an in-line price which is too low subjects the producers to too much risk. And this risk may endanger investment in the industry. In that event the FPC would have to weigh this danger against the diminution of consumer protection. But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection.

Finally, it is argued that elimination of temporarily certificated and contract prices from the price array will cause a "price-freeze." But our proposed decision will not freeze the price of gas. If the producer is dissatisfied with the in-line price he can file a new, and higher, rate schedule under § 4 of the Act.[75] Neither will our decision permanently freeze the in-line price for an area. We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between

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[75] See note 45, *supra*.

sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing. But we do not hold that the FPC can never raise the price line in the interim period. We hold only that the Commission has advanced no reason why an escalation is justified in this case.

Other Claims Regarding the In-Line Price

New York argues that the FPC erroneously determined the pre-Policy Statement in-line price for District No. 3, because it gave weight to prices "tainted" by other prices which were permanently certificated in 1956-57. New York thinks these 1956-57 prices were incorrectly certificated "in light of *CATCO* and the subsequent court cases." [76] Although sometimes it may be wise to re-examine certificated prices, we think that the FPC may give weight to permanently certificated prices even if they were certificated under standards later changed by the courts. This area of the law is constantly changing, and if we require the Commission to re-examine earlier certifications whenever there is a new decision, hearings under § 7 will never end. The proper rule was stated by the Ninth Circuit.

> No doubt there are many certificated prices—some under unconditional certificates and others . . . conditioned, some established in contested proceedings and others not contested—which might be different and lower, if the Commission were passing on them under section 7 today. But this, we think, does not *require*, although it may *permit*, the Commission to disregard them or to give little weight to them in deciding what is an appropriate price line to which to refer.[77]

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[76] Brief for Petitioner, p. 27.

[77] *California* v. *Federal Power Commission*, 353 F.2d 16, 23 (1965). [Emphasis in the original.]

Though the FPC is not required to re-examine permanently certificated prices, neither is it required to include a price in the price array simply because the price was sanctioned in a permanent certificate. The Commission may ignore a price if it has a good reason to do so.[78] In this case, over Superior's objection, the Commission refused to give full weight to certain 20¢ sales. According to the FPC these and similar sales should be discounted because "they either have subseqently been set aside . . . or would have been set aside . . . save for the procedural defect in the PSC review action."[79] This reason is adequate, and we do not think the Commission abused its discretion by not giving full weight to the 20¢ sales.

Lone Star Gathering Company

New York claims that Lone Star is a gathering company rather than a pipeline, and therefore sales to Lone Star should be certificated at the in-line price less the cost of gathering. Since oral argument we have been informed that in Opinion No. 505 the FPC granted Lone Star and United Gas Pipe Line Company permission to consolidate some of their facilities.[80] The FPC was to rehear that case beginning December 6, 1966.[81] Since we do not know what effect the Commission's final decision will have on the issue before us, we reserve decision on New York's claim.

We need not deal with any of the other contentions regarding the in-line price. Some of the parties may now

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[78] A price which is not "comparable" is not considered even if it is permanently certificated. See *United Gas Improvement Co. v. Federal Power Commission, supra* note 36, at 823.

[79] H.A. 284.

[80] *Lone Star Gas Company, et al.*, Docket Nos. CP65-118, *et al.*, issued August 22, 1966.

[81] Order issued October 14, 1966.

wish to abandon some of their claims. On remand the FPC can deal with the remaining claims according to the principles announced in this opinion.

III

Refunds

New York argues that the FPC erroneously postponed a decision about whether the producers must refund amounts which were collected, pursuant to temporary certificates, in excess of the in-line level set in the permanent certificate. The FPC answered that it had been awaiting the Supreme Court's action in the *Callery* case which was not decided until December of 1965.[82] According to the FPC's brief, its decision in this case "should be forthcoming in the near future" now that the Supreme Court has decided *Callery*.[83] The Commission took its promise seriously, and on July 22, 1966, it issued Opinion No. 498 which required refunds from some of the producer-applicants involved in the *Hawkins* proceeding.[84] We may assume that a decision in *Sinclair* will follow.

IV

Interest Rates

Superior attacks the FPC's order which sets interest rates for some refunds at 7% and for others at 4½%. Since Superior did not make this objection in an application for rehearing before the Commission, we cannot deal with the claim.[85] In any event, at least on the record

[82] *Supra* note 31.

[83] Brief for Respondent, p. 37.

[84] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, Docket Nos. G-18077, *et al.* The order was amended in Opinion No. 498-A (December 6, 1966).

[85] 15 U.S.C. § 717r (b) (1964). *Cf. Utah Power & Light Co. v. Federal Power Commission*, 339 F.2d 436 (10th Cir. 1964).

and briefs now before us, the Commission's justification for the 7% interest rate seems reasonable.

The Commission's order will be set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

WILBUR K. MILLER, *Senior Circuit Judge,* dissents.

APPENDIX

Statements Explaining the Method Used to Determine the in-Line Price

In *Hawkins* the hearing examiner explained his decision in the following terms.

> It will be observed from the foregoing distribution of prices for the period September 28, 1960 through December 31, 1963 [the price array], that the largest concentration of sales occurred at 14 cents and 15 cents per Mcf, and that the largest volumes of gas were sold at or below 15 cents per Mcf—more than 80 percent. The average sales price for the period was approximately 14.67 cents and the average sales price by volume was approximately 15.51 cents per Mcf. In respect to the period January 1, 1958 through September 27, 1960 more than 73 percent of the sales occurred at 16 cents or below and these sales account for more than half the volume. The average sales price for this period is 15.41 cents per Mcf and the average sale price by volume is approximately 16.76 cents per Mcf. When the two periods are combined (January 1, 1958 through December 31, 1963) it is apparent that there are two major concentrations of sales namely at 14 cents and 15 cents and minor concentrations at 13.5, 14.5, 16.2 and 20 cents. The average price of the 94 sales is 15.11 cents per Mcf and the average by volume is 16.43 cents per Mcf.

In view of the foregoing and the evidence adduced there is ample support for finding that 16 cents per Mcf at 14.65 psia is an appropriate "in line" price applicable to producer contracts in this proceeding for the period prior to September 28, 1960. The Staff witness found, however, that 16.2 cents was the appropriate "in line" price applicable to the period following September 28, 1960 and in doing so stressed the significance of the sales which were made at 16.2 cents per Mcf. (Four sales before September 28, 1960 and three afterwards.) We do not think that this is decisive. Indeed there is evidence which tends to show that a higher price may be justified for the pre-Policy Statement period than for the post-Policy Statement period.

It is manifest that the "in line" price is neither the highest price nor the lowest price at which gas is sold from a particular area in interstate commerce. It is also clear that it is not the general average of prices at which gas is sold in a particular period or indeed the mathematical weighted average. Consideration necessarily must be given, however, to the number of sales as well as to the volume—large volumes frequently selling at higher prices than low volumes. Consideration should be given to numerous factors depending upon individual circumstances from one case to another. Consideration must also be given to the Commission's Statement of General Policy No. 61-1, and to policy of the Natural Gas Act as heretofore construed by the Commission and by the courts particularly by the United States Supreme Court in the CATCO case. *Atlantic Refining Co.* v. *P.S.C.* 360 U.S. 378. In view of these factors and all the facts of record we conclude that the subject sales in this proceeding from the Texas Railroad District No. 3 made under contracts executed both before and after the Policy Statement dated September 28, 1960 should be conditioned at a price no greater than 16 cents per Mcf at 14.65 psia. H.A. 248-50.

When the Commission reviewed the examiner's initial decision, it explained the method as follows:

For the pre-Policy Statement period we agree with the examiner that 16 cents per Mcf . . . is the appropriate in-line price. . . . As can be seen from the table above [the price array], there are comparatively large volumes of gas sold at the 16.0 and 16.2-cent levels, small volumes at 17.5 and 18.0, and very large volumes at 20 cents. 38 sales (72 percent) are at 16 cents or below, while a little more than half the volume is sold at 16 cents or below. . . . Arithmetically the large volumes at 20 cents would have a strong effect on the weighted average of 15.16 cents per Mcf, but these should be discounted. . . .

The producers, on the other hand, argue that the 20-cent sales, if not given full weight, should be given some weight. The Commission adopted this consideration in *Sun Oil Co.* . . . A ceiling at 16 cents for the pre-Policy Statement period, in effect, gives some weight to the prices above 16 cents as well as the contract prices and the prices under temporary certificate, for if we gave no consideration to the prices above 16 cents, the ceiling would be set at a lower level, since ordinarily we do not set the ceiling price at the highest level.

As for the post-Policy Statement period, it may be observed that there are nine sales and moderate volumes at 15 cents, three sales and moderate volumes at 16.2 cents, one sale and a small volume at 16.5 cents, and three large sales at 18.0 cents. As the producers argue, the fact that the 18-cent prices were established in abridged hearings should not detract from their weight in setting the line. . . .

We are of the opinion that 17.0 cents per Mcf . . . is the in-line price for the period following September 28, 1960. It is our judgment that this conclusion gives appropriate weight to the comparatively large volumes sold under permanent certificates at 18.0 cents per Mcf while reflecting the weighted average price of 16.17 cents per Mcf. In addition, a 17.0 cent price clearly gives some weight to the unconditioned contract prices and to the prices under temporary certificates. Finally, some 43 percent of the gas has been permanently certificated at a price higher than 17.0 cents. One pro-

posed sale . . . is at 17.0 cents, under a contract dated October 1, 1963. Giving due consideration to all sales in the area during the period in question, an in-line price of 17.0 cents is fully justified. H.A. 284-286.

In *Sinclair* the trial examiner determined the pre-Policy Statement in-line price as follows:

Applying the criteria for the determination of an in-line price, as developed by the numerous Commission and Court decisions following Catco, to the data in the foregoing tabulation, resulted in a numerically weighted average price of 16.68 cents per Mcf and a volumetrically weighted average price of 17.18 cents per Mcf. In according the proper evidentiary weight to the evidence of record, most reliance or the greatest weight has been accorded the 14 permanently certificated sales with an estimated first month's delivery volume of 460,575 Mcf. These sales and volumes do not "reflect current conditions in the industry" because of their limited nature. Having accorded the greatest weight to the permanently certificated sales and in giving appropriate consideration to temporary certificated sales at substantial volumes presently moving in interstate commerce, it is concluded the public convenience and necessity requires the natural gas here under consideration at an in-line price of 16.0 cents per Mcf at 14.65 psia.

The in-lineness of the 16.0 cents per Mcf here determined may be further demonstrated. The Commission said in *Texaco-Seaboard Inc., et al.*; 27 FPC 482, 485, and *Hassie Hunt Trust (Operator) et al.*, 30 FPC 1438, 1445, ". . . as brought out in *Catco* and . . . in Texaco-Seaboard, the price line does not accord with the highest price or prices permanently authorized but falls between the highest group of prices and the median price." Applying this test to Staff Chart 3, Exhibit 4, [the price array] . . . , reveals a median price of 14.57 cents (volumetric weighted average) which, when averaged with the highest price of 17.59 cents, produces an in-line price of 16.08 cents per Mcf.

A similar test further illustrates the in-lineness of the 16.0 price per Mcf.

> Using *all* permanently (77) and *all* temporarily (35) certificated sales related to *all* volumes of natural gas (4,390,500 Mcf) moving in interstate commerce during the period after September 28, 1960, and through March 10, 1964, from District No. 2, a volumetrically weighted average price of 15.15 cents per Mcf is indicated. This median price when averaged with the highest temporarily certificated price of 18.00 cents per Mcf produces an in-line price of 16.57 cents per Mcf. S.A. 181-82.

Of the post-Policy Statement in-line price, the examiner said:

> For the 22 sales being made in the 14.0 to 14.75 cent price level in the above tabulation [the price array] the numerically weighted average price is 14.24 cents and the volumetrically weighted average price is 14.35 cents per Mcf at 14.65 psia. However, the numerically weighted average price for the 29 sales is 14.58 cents per Mcf and the volumetrically weighted average price is 14.84 cents per Mcf at 14.65 psia. Considering the foregoing data and the evidence of record showing the history of prices and the price patterns in District No. 2, the Examiner is of the opinion that the present or future public convenience and necessity requires the natural gas here under consideration at an in-line price of 15.0 cents per Mcf at 14.65 psia. S.A. 185-86.

The Commission further explained the method of selecting the post-Policy Statement in-line price as follows:

> A totaling of all permanently and temporarily certificated sales in District No. 2 under contracts dated after September 28, 1960 and through March 10, 1964, exclusive of the sales to Valley at 14 cents, shows a listing of 101 sales involving a combined estimated first month volume of 4,060,388 Mcf. The median price on a volumetric basis is 16.00 cents and the volumetric weighted average price is 15.29 cents. Approximately 53 percent of the estimated first month volume covered by these sales moved in the price range of from 16 cents to 18 cents. On the basis of these calculations, and with recognition of the fact that the temporarily

certificated sales represented most of the sales above the 16 cents price level, and should not be accorded undue weight, and giving some weight to the unconditioned contracts we conclude that the price of 16 cents per Mcf represents the correct post-policy in-line price of jurisdictional sales of natural gas in District No. 2. In reaching this result we may observe that if we confined ourselves to permanently certificated sales we would not find a line as high as 16 cents, for the next highest sales are at the 15.25 cents level. S.A. 225-26.

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In the Supreme Court of the United States

OCTOBER TERM, 1966 67

FEDERAL POWER COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission,
Washington, D.C. 20426.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case, entered on March 27, 1967.

OPINIONS BELOW

The court of appeals' *per curiam* opinion and orders here under review, formally setting aside the Commission's orders directing refunds, are not yet reported (App. A, *infra,* pp. 9–13). The court rendered two earlier opinions holding that the Commission had no power to require the refunds in question. One of these is reported at 370 F. 2d 181, and reprinted as App. A to the Commission's petition for a writ of certiorari in *Federal Power Commission* v.

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Sunray DX Oil Co., No. 1133, this Term. The other, *Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10, Nos. 7912 *et seq.*, is not yet reported. The pertinent portion of that opinion is printed in App. C, *infra*, pp. 22–28. The opinions and orders of the Federal Power Commission directing the refunds are not yet reported. They are printed in the Commission's petition in No. 1133 as App. C.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 14–21) were entered on March 27, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested

persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission, on the basis of applicants' allegations of emergency and without no-

tice or hearing, issued temporary certificates of public convenience and necessity permitting producers of natural gas to sell gas at specified prices pending hearing and determination by the Commission of their applications for permanent certificates. Subsequently, in the proceedings on the latter applications, the Commission determined the maximum initial price at which the gas could be sold consistently with the public convenience and necessity. This price was lower than those the producers had been charging under the temporary certificates. The question presented is whether the Commission is without power to require the producers to refund any of the excess collected during the interim period.[1]

STATEMENT

This case involves essentially the same sales of natural gas that are the subject of our petition for a writ of certiorari in No. 1133, this Term. As set forth in that petition, the Commission (by the orders there involved) granted permanent certificates for a number of sales which had previously commenced under temporary certificates. In most instances, the prices collected under the temporary certificates proved to

[1] In the event that certiorari is granted, we reserve the right to argue additionally that the Commission reasonably exercised its power in directing the refunds which it ordered in these proceedings. The question of the Commission's power and the propriety of its exercise of that power are of course closely related. Moreover, the latter question involves no complexities or factual disputes of a kind which would counsel preliminary examination by the lower court. Thus, this Court may consider it appropriate to dispose of the entire case even though the court of appeals decided only the question set forth in the text.

be higher than the permanent certificate price. The orders granting permanent authority reserved for future determination the question whether, as a further condition to the granting of the permanent certificates, the producers should be required to refund the charges collected under the temporary certificates insofar as those charges exceeded the amounts which would have been collected at the "in line" rate of 16 cents.

In the proceedings to which No. 1133 relates, the producers filed petitions for review challenging, *inter alia,* the Commission's power to order such refunds. The Commission urged dismissal of this challenge as premature. The court of appeals, noting that while the case had been pending before it the Commission had decided the reserved question (in the supplementary orders involved here), ruled that the Commission had no power to order any refunds, where, as here, the temporary certificates had not explicitly warned the producers that they might be ordered to make refunds should the in-line price prove to be lower than the prices charged during the period of temporary authorization.

The supplementary orders to which the court referred are those in issue here. They direct refunds of all amounts collected by the producers under their temporary certificates in excess of the in-line price of 16 cents, with the exception of (1) royalty payments made prior to February 1, 1964, attributable to the excess amounts collected and (2) State production payments for the same period attributable to the excess amounts collected, if they could not be recouped by

credit or otherwise (Pet. No. 1133, App. C). The producers also sought judicial review of these orders. Their petitions for review were consolidated in the Tenth Circuit, which, *per curiam,* on the basis of its earlier decision that the Commission had no power to order refunds in such circumstances, set aside the refund orders (App. A, *infra,* p. 12). The court did not reach the producers' further contention that, in any event, the ordering of refunds here was inequitable. The court stated (App. A, *infra,* pp. 11–12) that it would not consider that issue until and unless this Court determined that the Commission had the power to order refunds.

REASONS FOR GRANTING THE WRIT

In the judgment that we have asked this Court to review in our petition for certiorari in No. 1133, this Term, *Federal Power Commission* v. *Sunray DX Oil Co., et al.,* the Court of Appeals for the Tenth Circuit set aside a decision of the Commission granting certificates of public convenience and necessity, insofar as the Commission had reserved the question whether, as a condition of granting the certificates, it should require the applicants to refund certain excessive amounts received during a period of temporary authorization. In a subsequent decision, the same court

set aside the Commission's later orders resolving the reserved question and directing the producers to make refund. We believe that it would be appropriate for the Court to review this decision as well, and, if certiorari is granted, to consolidate the two cases for briefing and oral argument. Our reasons are as follows:

1. Should this Court grant certiorari in No. 1133 and reverse the court of appeals' judgment in that case, the court's later judgment setting aside the actual refund orders would remain technically undisturbed. Further proceedings in that court might therefore be required before the refunds could actually be made.

2. While we have concluded (see Pet. No. 1133, p. 7, n. 6) that the court of appeals, in its first decision, was not premature in reaching the question of the Commission's power to order refunds, a grant of certiorari to review the court's later decision would serve to obviate any possible question as to whether the issue is ripe for review.

3. Review of the second judgment of the court below would enable the Court—should it deem such a course appropriate—to terminate this litigation by ruling finally on whether the Commission properly ordered refunds in the circumstances of this case (see p. 4, n. 1, *supra*).

CONCLUSION

The petition for a writ of certiorari should be granted, and the case consolidated for briefing and oral argument with No. 1133.[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

APRIL 1967.

[2] Along with the companion petitions of the consumer interests, Nos. 1134 and 1135.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 9289, March Term, 1967

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; TEXACO INC.; SUNRAY DX OIL COMPANY; HUMBLE OIL & REFINING COMPANY; LAMAR HUNT; SOHIO PETROLEUM COMPANY; AND SUN OIL COMPANY, INTERVENORS

Filed March 27, 1967

On Petition to Review Orders of the Federal Power Commission

Before BREITENSTEIN, HILL, and SETH, Circuit Judges.

Per curiam

This petition seeks review of Federal Power Commission Opinions Nos. 501 and 501-A which require the petitioner and other independent producers, all of whom were parties to the consolidated proceedings styled Amerada Petroleum Corporation, et al., Docket Nos. C162 etc., to make refunds of amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422.

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Opinion No. 501 was entered while proceedings were pending before us for the review of Opinion No. 422. We disposed of the latter opinion and its accompanying orders in Nos. 7781 etc., *Sunray DX Oil Company, et al.* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181.

In that Sunray DX decision we pointed out that the threat of refund orders inherent in Opinion No. 422 had been followed by the action taken in Opinion No. 501; that the refund question was ripe for judicial determination; and that "proper judicial administration requires that it be deferred no longer." We held that, absent considerations not there present, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

Our decision on the refund issue was reaffirmed in Nos. 7912 etc., *Pan American Petroleum Corporation, et al.,* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——.

The petition for review now before us attacks Opinions Nos. 501 and 501–A on the grounds that the Commission lacked the power to order the refunds and that the power, if existing, was not properly exercised. The Commission, without waiving its opposition to our disposition of the refund issue, has moved for the severance of the issue of power from the issue of exercise of that power and for the summary disposition of the power issue. The petitioner has moved that the court "enter its Per Curiam Decision vacating and setting aside, on the basis of Opinion issued December 9, 1966, [the Sunray DX decision] * * * , Respondent's Opinion Nos. 501 and 501–A and related Orders." The Commission filed a response to the petitioner's motion and, although reas-

serting its position on the merits, said that "it agrees to the proposed procedure for decision."

Petitions for certiorari to review our Sunray DX decision are now pending in the United States Supreme Court. See 35 LW 3323.

We have before us 10 other petitions to review Opinions Nos. 501 and 501-A. They are:

No. 9227—Sunray DX Oil Company
No. 9287—Patchin-Wilmoth Industries, Inc.
No. 9308—Sohio Petroleum Company
No. 9310—Texaco, Inc.
No. 9311—Sun Oil Company
No. 9315—Edwin L. Cox
No. 9316—Humble Oil & Refining Company
No. 9317—Lamar Hunt
No. 9318—George H. Coates
No. 9319—Clark Fuel Producing Company

By petitions in intervention heretofore granted, Texaco, Sunray DX, Humble, Hunt, Sohio, and Sun oppose both the motion of the Commission for a severance and the motion of Standard Oil Company of Texas for summary disposition. These intervenors assert that the grant of such motions would result in the improper fragmentation of appeals and would have the effect of depriving them of the right to be heard on the individual inequities arising from the manner in which the Commission has ordered refunds.

We are committed to the principle that the Commission has no power to order refunds when the temporary certificate contains no express refund provisions. Because we believe that the Commission lacks such power, we are not concerned with the exercise of the power. No good purpose would be served by granting the severance which the Commission proposes. The exercise of the power depends on the existence of the power. With commendable frank-

ness the Commission says that we are wrong in the Sunray DX decision on refunds and that it expects the error to be rectified in the certiorari proceedings which it has brought. When and if this occurs, the time will have arrived for us to consider the individual equities.

In the ten other petitions for review of Opinions Nos. 501 and 501–A we have no motion for summary disposition like that presented here by Standard Oil Company of Texas. All petitions should receive the same treatment. Accordingly, on our own motion, we are today deciding all ten of them on the basis of this decision.

The motion of the respondent for severance is denied. The motion of the petitioner for summary disposition is granted. On the authority of *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181, and *Pan American Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9227

Per curiam

The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

Nos. 9308 AND 9318

Per curiam

The motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

Nos. 9287, 9310, 9311, 9315, 9316, 9317 AND 9319

Per curiam

The motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

APPENDIX B

United States Court of Appeals, Tenth Circuit

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; TEXACO INC.; SUNRAY DX OIL COMPANY; HUMBLE OIL & REFINING COMPANY; LAMAR HUNT; SOHIO PETROLEUM COMPANY; AND SUN OIL COMPANY, AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

Filed March 27, 1967

On Petitions To Review Orders of the Federal Power Commission

No. 9289, March Term, 1967

Before Honorable JEAN S. BREITENSTEIN, Honorable DELMAS C. HILL, and Honorable OLIVER SETH, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission, motion of respondent for severance and motion of petitioner for summary disposition and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner for summary disposition is granted. On the authority of *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 370 F.2d 181, and *Pan American Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., —— F.2d ——, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9227

SUNRAY DX OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS IMPROVEMENT COMPANY; SUN OIL COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of petitioner to hold in abeyance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9308

SOHIO PETROLEUM COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission, motion of respondent for severance and motion of petitioner to hold in abeyance, and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9318

GEORGE H. COATES, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission, mo-

tion of respondent for severance and motion of petitioner to hold in abeyance, and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9287

PATCHIN-WILMOTH INDUSTRIES, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9310

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9311

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and

motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9315

EDWIN L. COX, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9316

HUMBLE OIL & REFINING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9317

LAMAR HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9319

CLARK FUEL PRODUCING COMPANY (OPERATOR) ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

APPENDIX C

United States Court of Appeals, Tenth Circuit

Nos. 7912, 7962, 8115, 8116, 8118, 8119, 8121, 8122, 8123, 8124, 8125, January Term, 1967

March 9, 1967

PAN AMERICAN PETROLEUM CORPORATION; E. COCKRELL, JR.; CONTINENTAL OIL COMPANY; FREEPORT SULPHUR COMPANY; GENERAL AMERICAN OIL COMPANY OF TEXAS; J. RAY MCDERMOTT & CO., INC.; PLACID OIL COMPANY, ET AL.; SHELL OIL COMPANY; THE SUPERIOR OIL COMPANY; AND U.S. OIL OF LOUISIANA INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

LONG ISLAND LIGHTING COMPANY; PHILADELPHIA ELECTRIC COMPANY; PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENORS

On Petitions To Review Orders of the Federal Power Commission

Before LEWIS, BREITENSTEIN, and HILL, Circuit Judges.

LEWIS, Circuit Judge.

These petitions by independent natural gas producers seek review under section 19(b) of the Natural

Gas Act[1] of orders entered by the Federal Power Commision establishing an "in-line" price and other conditions for permanent certificates of public convenience and necessity issued under section 7 of the Act and covering sales of gas in interstate commerce from producing areas in South Louisiana and the adjacent federal domain offshore.[2] Proceedings before the Commission encompassed some 362 separate certificate applications, two-thirds of which were settled and severed before the conclusion of hearings, for a wide variety of gas-sales contracts executed between 1945 and 1963.[3] By its orders the Commission set the "in-line" price, or maximum initial price, at 18.5 cents per Mcf, with an additional 1.5 cents per Mcf for tax reimbursement where the gas is produced within the taxing jurisdiction of Louisiana. Refunds were required, with interest, for amounts in excess of the in-line price previously collected under temporary certificates that contained express provisions for potential refund liability. All permanent certificates that issued were made subject to a moratorium on increased-rate filings above 23.55 cents per Mcf, including tax reimbursement, pending completion of the South Louisiana area rate proceeding or July 1, 1967, whichever is earlier. Finally, for those producers whose temporary certificates contained no refund conditions, the Commission reserved for further consideration the question of whether they would in fact be required to make refunds.

The petitions are before this court by virtue of the fact that Pan American Petroleum Corporation, pe-

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[1] 15 U.S.C. § 717r(b).

[2] *Union Texas Petroleum et al.*, Opinions Nos. 436 and 436-A, reported at 32 F.P.C. 254 and 32 F.P.C. 952.

[3] The petitions for review by four producers have been separately considered in this court. See *Continental Oil Co. v. FPC* —— F. 2d, Feb. 10, 1967.

titioner in Nos. 7912 and 7962, has its principal place of business within the territorial bounds of this circuit and was the first producer to file for review. The other petitioners are transfers from other circuits. 28 U.S.C. § 2112(a). The four intervenors are parties of record, but upon their election not to file briefs we denied their requests to present oral arguments.

At the hearings below, several producers offered economic and geological evidence which purported to reflect an increase in production costs from those that had prevailed during prior South Louisiana certificate proceedings. The examiner rejected this evidence, the Commission sustained the examiner, and some of the petitioners here have filed motions to adduce. Action on the motions was deferred until completion of arguments on the merits of the orders. We have since held in *Sunray DX Oil Co.* v. *FPC*, —— F. 2d ——, Dec. 9, 1966,[4] that the standards of public convenience and necessity to be applied by the Commission in section 7 proceedings do not compel admission of such evidence. And while circumstances surrounding certificate applications may on occasion dictate consideration of cost factors, these are matters subject in the first instance to Commission expertise and discretion. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227. Here, as will be discussed, the Commission's orders are based partially upon comparisons between current prices and in-line prices previously established. Concededly, current economic and geological cost evidence could have a substantial effect upon final disposition of the applications. But for purposes of section 7, there is noth-

[4] References hereinafter to *Sunray DX* will be to the Dec. 9, 1966 decision of this court, —— F. 2d ——, unless otherwise noted.

ing in the record to suggest an abuse of Commission discretion in the rejection of such evidence, and accordingly, the motions to adduce will be denied. We turn then to the substantive content of the orders and the producers' various objections thereto.

* * * * *

REFUNDS UNDER UNCONDITIONED TEMPORARY CERTIFICATES

As in our *Sunray DX* case, petitioners vigorously object to the portion of the Commission's orders that defers for further consideration the questions of whether and to what extend refunds will be required where temporary certificates were issued without express refund conditions. And while, unlike *Sunray DX*, we are not aware of any recent Commission action directing petitioners with unconditioned temporary certificates to make refunds out of the subject sales, we are nevertheless convinced that there is sufficient aggrievement for review at this time. On the authority of the *Skelly* case, *Public Service Comm'n of New York* v. *FPC, D.C. Cir.*, 329 F. 2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963, the Commission has ruled that it has "both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price" even where temporary authorizations are silent as to potential refund liability. *Skelly Oil Co., et al.*, Opinion No. 492, June 1, 1966.[13] Many producers, in reliance upon prior assurances that all of the moneys collected

[13] See also *Sun Oil Co., et al.*, Opinion No. 502, July 28, 1966; *Amerada Petroleum Corp., et al.*, Opinion No. 501, July 27, 1966; *Turnbull & Zoch Drilling Co., et al.*, Opinion No. 499, July 25, 1966; *H. L. Hawkins, et al.*, Opinion No. 498, July 22, 1966.

under such authorizations was theirs to keep,[14] have spent or reinvested the proceeds from their sales and would be hard put to find now the substantial amounts necessary for refunds. Inasmuch as the Commission's position on the merits of the issue is firmly established, albeit in opinions not related to this case, the threat of loss to these petitioners is real and imminent, and judicial consideration of their liability need not be postponed. *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 417–21; *Sunray DX Oil Co.* v. *FPC,* 10 Cir., 351 F. 2d 395, 400; *Hinton* v. *Udall,* D.C. Cir., 364 F. 2d 676, 680.

We held in *Sunray DX* that "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refund by the acceptance of a temporary certificate containing an express refund condition."[15] We adhere to that decision for purposes of this case and see no reasons for duplication here of principles and views already discussed. We shall, however, consider one con-

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[14] See FPC Chairman Swidler's published address to the 1961 annual meeting of the American Petroleum Institute. See also 29 F.P.C. 223, 225, where in denying intervenors' motions to impose refund conditions on previously issued unconditioned temporary certificates, a unanimous Commission stated:

> "[W]e would be in a position of having induced producers' to dedicated their gas to the market upon one set of conditions, and then imposing course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon (the producer's) part'. *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy."

[15] ——— F. 2d at ———. The rule would not apply of course where an unconditioned temporary certificate has not become final and is overturned by a reviewing court. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229.

tention that has been made by the Commission and not covered in the *Sunray DX* opinion. It is that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the District of Columbia Circuit's *Skelly* decision. From then on, says the Commission, "a producer should have taken steps to protect himself in the event refunds were ordered, and if he failed to do so, he has no equity to plead which will affect his refund obligation."[16] Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certificates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that "it is entirely possible * * * that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate." It is difficult to imagine how a case in this posture could have dictated immediate preparation for a turning away from years of Commission assurances[17] and from what was believed to be settled judicial interpretation.[18]

Both the Commission and the courts have repeatedly

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[16] *H. L. Hawkins, et al.*, Opinion No. 498, p. 3, July 22, 1966.

[17] See note 14 *supra.*

[18] *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404, 408–10; *cf. PFC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

acknowledged that stability of prices is one of the great objectives of regulation under the Natural Gas Act. We have been especially mindful of this objective in our consideration of the moratoria on new rate filings and other restrictive conditions in the producers' licenses to sell gas in interstate commerce. It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created. The Commission has stated that "temporary authorizations are not and could never be a vehicle for assuring such [price] stability by the very method by which they are handled." *Skelly Oil Co., et al.*, Opinion 492, p. 4, June 1, 1966. We emphatically disagree. The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case.

The motions to adduce additional evidence are denied. All cases are remanded to the Commission for further proceedings consistent with this opinion.

U.S. GOVERNMENT PRINTING OFFICE: 1967

APR 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. ~~1290~~ 97

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, The United Gas Improvement Company, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Tenth Circuit on March 27, 1967, which reversed certain orders of the Federal Power Commission. The Federal Power Commission has filed a Petition seeking review of the same orders. See No. 1227, this Term.

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit is not yet reported. Likewise the opinions and orders of the Federal Power Commission reversed by the Court of Appeals are not yet reported. These have been reproduced as Appendices "A" and "C" of the petition for a writ of certiorari filed by the Solicitor General, on behalf of the Federal Power Commission, in this and certain cognate matters. See No. 1227, this Term.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 27, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717(r)(b).

QUESTIONS PRESENTED.

This case, arising out of the same proceeding as Nos. 1133, 1134 and 1135, this Term, involves certificate applications by independent producers under § 7(c) of the Natural Gas Act. The issues before this Court in this case and in No. 1133 *et al.* arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers at the very high prices contained in the producer-pipeline contracts. After the statutory hearing on permanent certification the Commission determined the maximum initial price at which the gas involved could be sold in interstate commerce consistently with the public convenience and necessity. Since this price was lower than the contract price, the Commission, pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court, determined that portions of the excesses above the lawful price, collected pursuant to *ex parte* temporary certificates, must in equity be refunded by producers in order to afford the consumer a complete bond of protection. On appeal by producers from this order the Court of Appeals, relying on its cognate decision in *Sunray DX Oil Co. v. FPC,* 370 F. 2d 181, *petition for cert. pending,* No. 1133 *et al.,* this Term, vacated the order *per curiam,* holding that the Commission lacked all power to order any refund of unlawful excesses. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund amounts collected pursuant to *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Assuming § 7 permits the Commission to so condition permanent certificates, were the conditions reasonable in this case?

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) and (e) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

> EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.
>
> Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:
>
> • • •
>
> In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements

of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT OF THE CASE.

This case involves essentially the same sales of natural gas and the same legal issues dealt with in the Petitions for Writ of Certiorari in Nos. 1133-35, this Term. As set forth in the Petition in No. 1134, Sunray DX Oil Company and the other producers here entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producers applied for temporary certificates. These applications were made pursuant to that part of § 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ." Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers. Rather, such applications allege the possibility of economic problems for the individual producer itself, such as drainage by adjoining owners, necessity to flare gas or even simply loss of profits.[1]

While not using the word "refund," all the temporary certificates issued to the producers here involved contained the following or a similar provision:

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1. The implication of all such allegations is that if the producer did not receive the privilege of the *ex parte* temporary certification he would suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege and *any* benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy.

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (Joint Appendix in Nos. 1133 *et al.*, this Term, at 190, 192, 194, 196)

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant. No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including The United Gas Improvement Company[2] and the Public Service Commission of the State of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

refund of amounts already collected in excess of the legal conditioned rate level.

After formal hearing the prices collected under these temporary certificates were, in most instances, reduced to a lower level as a condition for permanent certification. These orders of the Commission granting permanent certificates reserved for future determination the question whether, as a further condition for the granting of the certificates, the producers should equitably be required to refund some or all of the unlawful excesses collected under temporary certificates.

The Commission received, from the producers involved, briefs containing offers of proof of equitable factors, urged as affecting the equitable requirement of refunds. Accepting these allegations as true, the Commission rejected the relevance of some and, recognizing the validity of others, ordered refund of *part* of the unlawful excesses. Producers appealed these orders to the Court of Appeals for the Tenth Circuit, which, on appeal from the Commission's original order deferring consideration of refunds, had recently ruled that the Commission lacked all power to order such refunds. The United Gas Improvement Company was granted intervention in the first appeal filed in the Court of Appeals, that of Sunray DX Oil Company. On March 27, 1967, the Court issued related *per curiam* orders vacating the orders of the Commission as they applied to Sunray DX and the other producers. The Court did not reach the producers' additional contention that, in any event, the ordering of refunds was inequitable in the circumstances of this case. The Court stated that it would not consider that issue until and unless this Court determined that the Commission had power at the threshold to order refunds.

REASONS FOR GRANTING THE WRIT.

The present case is an inseparable companion to that brought before the Court in Nos. 1133-35, this Term. In the order of which review is sought here, the Court of Appeals for the Tenth Circuit vacated orders of the Commission entered in the same proceeding as those for which review is sought in Nos. 1133-35, in express *per curiam* reliance upon its decision in that earlier case. It would be appropriate and in the interest of judicial economy for this Court to review the present decision as well and, if certiorari is granted, to consolidate the two cases for briefing and oral argument. The reasons for this are succinctly set forth at page 7 of the Solicitor General's brief for the Federal Power Commission in No. 1227 and those reasons are adopted here. In summary, the grant of certiorari here would enable this Court to resolve fully the issues of the existence of refund power in the Commission and its proper exercise, issues which have far reaching application beyond the particular Commission proceeding here under review. In our Petition in No. 1134, this Term, we pointed out that the rejection by the Court of Appeals of any refund power in the Commission is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963, and the rationale of this Court's decision in *United Gas Improvement Co. v. Callery Properties,* 382 U. S. 223. Moreover, this conflict causes serious administrative confusion, as the present case demonstrates, since an aggrieved party can apply to whichever Circuit has ruled favorably to its position and in the resulting confusion of law of the case the Commission could be rendered impotent to act in any direction.

CONCLUSION.

For the foregoing reasons it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: April 18, 1967.

No. 1328

APR 26 196

JOHN F. DAVIS, CLI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATUTES

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-823, as amended, 15 U.S.C. 717-717w:

Section 7(c), 15 U.S.C. 717f(c) 2
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Section 19(b), 15 U.S.C. 717r(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Shell Oil Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 7, 1967.

Opinions Below

The opinion of the Court of Appeals is reported at — F. 2d —. The opinion and order of the Federal Power Commission (J.A. 277-309) are reported at 34 F.P.C. 897, and its opinion on rehearing (J.A. 315-321) at 34 F.P.C. 1330, for Texas Railroad Commission District No. 3 and at 34 F.P.C. 930 (J.A. 215-241) and its opinion on rehearing at 34 F.P.C. 1357 (J.A. 247-253) for Texas Railroad Commission District No. 2. The Commission's later opinions and orders, providing for refunds are not yet reported.

Jurisdiction

The judgment of the Court of Appeals reversing and remanding to the Commission for further proceedings was entered on February 7, 1967. This petition is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

Statute Involved

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *."

Section 7(e), 15 U.S.C. 717f(e):

> "* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole

> or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Question Presented

Does the Federal Power Commission have the power to consider "current conditions" in the industry, which include contract prices, intrastate market competition, and the effect of its own policies on those conditions, in determining the level of the "in-line" price, or is it restricted in its consideration only to those prices which it has previously permanently certificated, and which are no longer subject to review?

Statement

In the opinions and orders which were remanded by the Court of Appeals for the District of Columbia Circuit, the Federal Power Commission had determined the "in-line" price for two of the "pricing areas" in the Texas Gulf Coast, Texas Railroad Commission District No. 2, a ten county area in the vicinity of Corpus Christi, Texas, and Texas Railroad Commission District No. 3, a twenty-nine county area in the vicinity of Houston, Texas. For District No. 2, the Commission determined the "in-line" price to be 15¢ prior to September 28, 1960, and 16¢ per Mcf subsequent to that date (Opinion No. 476, 34 FPC 930).

For District No. 3, the Commission determined that the "in-line" price was 16¢ prior to September 28, 1960, and 17¢ per Mcf subsequent to that date. These determinations were based on a substantial record, which included studies of all contract prices in these areas since 1954, evidence of the competitive effect of the intrastate market, a particularly critical factor in this area because of the large and expanding local demand for natural gas for industrial purposes, and testimony by witnesses of the impact of the Statement of General Policy (18 C.F.R. § 2.56; 24 FPC 818) issued by the Commission on September 28, 1960, on gas prices in this area. Additional testimony on costs and economic conditions to support their contract prices was offered by the producers, but excluded by the Commission under its *Skelly* rule (28 FPC 401). This Court has sustained the Commission's discretion to exclude such evidence in a certificate proceeding under Section 7 of the Natural Gas Act in *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223, 15 L. ed. 2d 284, 86 S. Ct. 360.

The Public Service Commission of New York and certain gas distribution companies on the eastern seaboard[1] have long been engaged in a campaign to hold the gas prices in the Texas Gulf Coast Area to the lowest possible level. As a part of this campaign, these intervenors (so referred to because their status in the certificate proceedings before the Federal Power Commission is that of an intervenor in opposition to the producer-applicant) have selectively intervened in those certificate proceedings where the initial contract price level was above that level deemed "acceptable" by these intervenors. Under Commission procedure, the effect of these interventions was to require the trial of

[1] Long Island Lighting Company, Brooklyn Union Gas Company and the Philadelphia Gas Works Division of United Gas Improvement Company.

these proceedings on a full record before a hearing examiner, with a review of the record and examiner's decision and briefs of the parties before the full Commission. This procedure is quite time-consuming, requiring three to five years to complete, or longer if accompanied by appeals to the Court of Appeals. Shell's dockets in these proceedings have been pending before either the Commission or the Courts since 1959. During all of this time, under the intervenors' theory, endorsed by the District of Columbia Circuit, the prices remain "suspect".[2]

There are a few sales of gas in these areas however, because of small quantities available, or extreme distances from existing pipeline systems, which cannot command the full market price.[3] The initial contract prices for these sales were therefore lower than the weighted average contract prices, and far below the highest contract prices, and also below the arbitrarily determined "acceptable" level of the intervenors. Because of the low level of these prices, no interventions were filed with the Commission against these sales, and therefore under the Commission's "shortened" procedure, permanent certificates were granted without opposition in a few months. These sales, say the intervenors, are the only sales which the Commission can look to to determine the price "line", because all other sales are "suspect" by virtue of the fact that they are being contested by these same intervenors on either the Commission or appellate Court levels.

The Commission properly rejected the limitation which the intervenors sought to place on their consideration of the price "line", finding that to do so would violate this Court's direction to keep the "'in-line' price at the level where *substantial amounts* of gas have been certificated to enter the

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[2] *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, cert. den. sub. nom. *Prado Oil & Gas Co.* v. *F.P.C.* 377 U.S. 963, 12 L. ed 2d 735, 84 S. Ct. 1644.

[3] Railroad District No. 3, 34 FPC 900, 901; (J.A. p. 281.) Railroad District No. 2, 34 FPC 936; (J.A. pp. 223, 224).

market under other *contemporaneous* certificates." (Emphasis supplied).[4] The Commission further found that to confine its consideration to previously-certificated, "non-suspect" prices, would merely operate to "freeze" the price "line", which would be inconsistent with the direction of the Ninth Circuit[5] and the Tenth Circuit[6] to change the "line" as necessary to give effect to "current conditions". The Commission also rejected producer contentions that the price "line" should be higher.

The intervenors appealed these Opinions to the District of Columbia Circuit (other appeals from other Commission decisions involving this question in other pricing areas were taken by both intervenors and producers to other Circuit Courts). That Court reversed the Commission's decision, finding that the Commission had committed reversible error in including in its consideration of factors making up the price "line", initial contract prices which had not been approved by the Commission, or which had been approved by the Commission through its procedure in issuing a temporary certificate under Section 7 of the Natural Gas Act. This Court has held that the powers of the Commission in issuing temporary certificates include powers to condition those certificates to protect the consumer in the "interim period" before rate regulation.[7] Nevertheless, the District of Columbia Circuit held that temporarily certificated prices would not be considered in determining the price "line."

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[4] *United Gas Improvement Company* v. *Callery Properties Inc.*, 382 U.S. 223, 15 L. ed 2d 284; 86 S. Ct. 360; at 15 L. ed 2d 288.

[5] *United Gas Improvement Company* v. *F.P.C.*, 283 F. 2d 817, (1960) cert. den. sub. nom. *Superior Oil Company* v. *United Gas Improvement Co.*, 365 U.S. 879, 6 L. ed 2d 191, 81 S. Ct. 1030; *State of California* v. *FPC*, 353 F. 2d 16 (1965).

[6] *Sohio Petroleum Company* v. *F.P.C.*, 298 F. 2d 465 (1961).

[7] *Federal Power Commission* v. *Hunt*, 376 U.S. 515; 11 L. ed 2d 878; 84 S. Ct. 861.

The D.C. Circuit admitted that the effect of its decision might be to cause a "freeze" of the "in-line" price. The Court said:[8]

> "It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing."

Reasons for Granting the Writ

The decision of the Court of Appeals for the District of Columbia Circuit is in square conflict with the decision of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Company* v. *Federal Power Commission*, 370 F. 2d 181. Petitions for a writ of certiorari from that decision have been filed in this Court by the Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and the Public Service Commission of New York, in Case No. 1135, on the same question presented here (Question No. 1) (the primary grounds alleged by petitioners there for granting the writ is the conflict with the D.C. Circuit's decision here sought to be reviewed). The Solicitor General on behalf of the Federal Power Commission has filed a Memorandum with the Court supporting that petition for certiorari on the grounds that a conflict exists between the two decisions of two Circuit Courts of Appeals, under Rule 19(b) of this Court. We therefore request that all of these petitions be consolidated for purposes of briefing and argument in this Court.

Subsequent to the *Sunray* case, the Court of Appeals for the Tenth Circuit has affirmed the Commission in *Pan American Petroleum Corporation* v. *Federal Power Com-*

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[8] — F. 2d —; page 25 of the slip opinion, attached hereto as Appendix A, pages 35, 36.

mission, — F. 2d —in which the Court found again that the Commission did not err in considering temporarily certificated prices in determining the price "line". The Tenth Circuit said:[9]

> "The general purpose of the Act is to protect the consumer, but section 7 proceedings, as well as other proceedings in the administration of the Act, must consider and attempt to obtain a balance between the interests of consumer, producer and all others whose interests fall between. The task is difficult, but experience has gradually attached more than lip-service significance to administrative expertise. Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices have made some adjustment in view of the inescapable captured market of regulation."

The attachment of price conditions on permanent certificates has always been discretionary with the Commission, and the Commission decision in establishing a price "line" is based on its expertise and careful consideration of all factors. Unless it abused its discretion, the Commission's decision must be sustained.[10] This Court said in CATCO:[11]

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, *the Commission in the exercise of its discretion might attach such conditions as it believes are necessary.*" (Emphasis supplied.)

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[9] Page 15 of the slip opinion. The case is not yet officially reported, so is attached as Appendix B hereto, for the convenience of the Court. (Quote appears at page 56 of Appendix B.)

[10] *Sunray DX Oil Company* v. *F.P.C.*, 370 F. 2d 181 at 190 (U.S.C.A. — 10th, 1966); *State of California* v. *F.P.C.*, 353 F. 2d 16 at 22, 23 (U.S.C.A. — 9th, 1965).

[11] *Atlantic Refining Company* v. *F.P.C.*, 360 U.S. 378; 3 L. ed 2d 1312; 79 S. Ct. 1246, at 360 U.S. 391.

The discretion of the Commission to look at factors other than its own permanently certificated prices in determining the price "line" is essential in the public interest. Otherwise there is no way that the Commission can compensate for changing "current conditions" by changing the price "line" accordingly, either up or down, except through a full-blown rate proceeding under Sections 4 and 5. This Court has held that this type of proceeding is not feasible in a proceeding under Section 7.[12]

Under the price "freeze" theory adopted by the District of Columbia Circuit, Section 7 of the Natural Gas Act is effectively written out of the Natural Gas Act, once the Commission has determined the "in-line" price for a given area. There is no way that the Commission can review, short of a full-blown rate hearing under Sections 4 and 5, the adequacy of supply in the area, and whether the price "line" established for the late 1950's is still in the public interest some ten years later. In *CATCO* this Court charged the Commission to insure that natural gas is sold ". . . at the lowest reasonable rate consistent with the *maintenance of adequate service* in the public interest" (360 U.S. at 388) (Emphasis supplied). The Commission determined in this case that the price "line" which it had fixed in the late 1950's was not sufficient to insure an adequate supply of gas for the interstate pipelines in the Texas Gulf Coast Area in the late 1960's. The District of Columbia Circuit Decision would require the Commission to "roll-back" prices to levels in effect ten years earlier, having "no current relevancy".[13]

The Decision Below has the practical effect of divesting the Federal Power Commission of jurisdiction to determine the price "line", a power granted to it by Congress under Section 7 of the Natural Gas Act, as interpreted by this Court in *Catco and Callery*, and vesting such jurisdiction

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[12] *United Gas Improvement Co.* v. *Callery Properties Inc., supra.*

[13] Such a roll-back was expressly rejected by the Ninth Circuit in *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 at 824.

in the Public Service Commision of New York [14] and the other intervenors. By the simple expedient of selecting the price level it deems acceptable, and intervening in all certificate proceedings where contract prices exceed that level, the New York Commission can make all prices not acceptable to it "suspect". Under the Decision Below the Commission is then precluded from considering these prices in its determination of the "line". In this way the New York Commission can, and has, if the Decision Below is not set aside, determined the "in-line" price for the pricing areas here in question.

The D. C. Circuit seeks to de-emphasize the impact of the "in-line" price "freeze" by noting that it is only effective until the Commission had determined a just and reasonable rate for the area in question. As the Court is aware, this "interim" for the Texas Gulf Coast Area is already thirteen years long, with the final decision in the Texas Gulf Coast Area Rate Proceeding (FPC Docket No. AR64-2) at least two years away. Moreover, the Commission has already determined that the just and reasonable rate which it determined in the Permian Area [15] will be the "in-line" price for that area.[16] Therefore the determination of a just and reasonable rate will only end one "interim" period and commence another. If it is to protect the public interest, the Commission must have the power to adjust this price for future contracts in the period between just and reasonable determinations under Sections 4 and 5 of the Natural Gas Act.

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[14] The Public Service Commission of New York can intervene in proceedings before the FPC as a matter of right, and the Commission has no power to exclude it, *Public Service Commission of New York* v. *FPC*; 295 F. 2d 140 (D.C. Cir. 1961), cert. den. sub. nom. *Shell Oil Company* v. *Public Service Commission of New York*, 368 U.S. 948; 7 L. ed 2d 343; 82 S. Ct. 388.

[15] 34 FPC 189; affirmed in part, reversed in part; *Skelly Oil Company* v. *FPC*; — F. 2d —; Case No. 8385 *et al.*, decided January 20, 1967.

[16] *El Paso Natural Gas Co.*, 35 FPC 40, appeals pending in 10th Cir.; *Phillips Petroleum Co.* v. *F.P.C.*, Case No. 8723, *et al.*

Conclusion

A square conflict between two Circuit Courts of Appeals requires determination by this Court of the basic issue whether the Commission's discretion to determine the price "line" is limited only to its own past actions, or whether it may continue to adjust the line as "current conditions" require. The future of the ability of the natural gas industry in the United States to maintain adequate supplies for the consumer may well hinge on this Court's decision.

Respectfully submitted,

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April 21, 1967.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

SUN OIL COMPANY,
SKELLY OIL COMPANY,
CALLERY PROPERTIES, INC.,
SHELL OIL COMPANY,
PAN AMERICAN PETROLEUM CORPORATION,
SUPERIOR OIL COMPANY,
HUMBLE OIL & REFINING COMPANY,
W. S. KILROY, et al., and KILROY PROPERTIES, INC.,
H. L. HAWKINS & H. L. HAWKINS, JR.,
PLACID OIL COMPANY, et al.,
INTERVENORS

No. 19,800

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

MONSANTO COMPANY
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD,
et al., EDWIN M. JONES OIL COMPANY,
SHELL OIL COMPANY,

H. D. Bruns & MPS Production Company,
Continental Oil Company,
Lamar Hunt,
INTERVENORS

No. 19,919

Long Island Lighting Company, PETITIONER

v.

Federal Power Commission, RESPONDENT

Lamar Hunt,
Mrs. James R. Dougherty, et al., W. A. Stockard, et al., Edwin M. Jones Oil Company,
INTERVENORS

No. 19,941

Continental Oil Company, PETITIONER

v.

Federal Power Commission, RESPONDENT

No. 19,957

The Superior Oil Company, PETITIONER

v.

Federal Power Commission, RESPONDENT

On Petitions to Review Orders of the Federal Power Commission

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Decided February 7, 1967

Mr. Morton L. Simons, with whom *Mr. Kent H. Brown* was on the brief, for petitioner in Nos. 19796 and 19800.

Mr. Joseph C. Johnson, of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of court, with whom *Messrs. Bruce R. Merrill* and *Thomas H. Burton* were on the brief, for petitioner in No. 19941.

Mr. Homer J. Penn for petitioner in No. 19957. *Messrs. Herbert W. Varner* and *William T. Kilbourne, II,* were on the brief for petitioner in No. 19957.

Mr. Joel Yohalem, Attorney, Federal Power Commission, with whom *Messrs. Richard A. Solomon,* General Counsel, and *Howard E. Wahrenbrock,* Solicitor, Federal Power Commission, were on the brief, for respondent.

Mr. Sherman S. Poland, with whom *Mr. Donald B. Robertson* was on the brief, for intervenor Skelly Oil Company in No. 19796, argued on behalf of all intervenors. *Mr. Oliver L. Stone* was on the brief for intervenor Shell Oil Company. *Mr. Richard F. Generelly* was on the brief for intervenors Callery Properties, Inc., H. L. Hawkins, H. L. Hawkins, Jr., and Monsanto Company. *Mr. J. Evans Attwell* was on the brief for intervenor W. S. Kilroy, et al. *Mr. James K. Schooler* was on the brief for intervenor Humble Oil & Refining Company. *Messrs. Carroll L. Gilliam* and *Philip R. Ehrenkranz* were on the brief for intervenor Pan American Petroleum Corporation. *Messrs. Bernard A. Foster, Jr.* and *Donald B. Robertson* were on the brief for intervenors Mrs. James R. Dougherty, et al., Edwin M. Jones Oil Company and W. A. Stockard, et al. *Messrs. Morton L. Simons* and *Bertram D. Moll* also entered appearances for petitioner in No. 19919. *Mr. Robert E. May* also entered an appearance for intervenor Skelly Oil Company. *Mr. Robert W. Henderson* also entered an appearance for intervenor, Lamar Hunt.

Before BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

BAZELON, *Chief Judge*: We are to review a Federal Power Commission (FPC) order certificating sales of natural gas from producers to interstate pipelines. The sales were certificated in the *Hawkins* (Texas Railroad District No. 3)[1] and *Sinclair* (Texas Railroad District No. 2)[2] proceedings, which are consolidated here.

The New York Public Service Commission challenges the certificates on three grounds. First, there was no showing of public need for the gas. Second, the "in-line" price was too high. And third, the FPC erroneously postponed deciding whether the producers should be required to refund amounts in excess of the in-line level which were collected under a temporary certificate. Superior and Continental (producers) challenge the in-line price as too low. Superior claims also that the FPC set too high an interest rate on funds which would be retained by the producers in excess of the amount allowed by the permanent certificates. The intervenors support the FPC's determinations, although some of them think that the in-line price should have been higher.

I

The Public Need for the Gas

We face some confusion about whether New York properly raised the issue of public need. At the prehearing conference in the *Hawkins* proceeding, New York limited the issue to whether or not the *pipelines* needed the gas.[3]

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[1] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.* Docket Nos. G-18077, *et al.*

[2] *Sinclair Oil & Gas Company, et al.* Docket Nos. G-16760, *et al.*

[3] H.A. (*Hawkins* Joint Appendix) 7-19.

However, in its exceptions to the Examiner's initial decision New York said, "In view of (a) the absence of any evidence of public need for the gas and (b) the many indications that pipelines in the Gulf Coast area are presently suffering from take-or-pay problems,[4] the application should be denied."[5] This raised the issue of the *public's* need for the gas. New York used the take-or-pay problems to alert the FPC to a potentially harmful situation and obligate it to give reasons why, in spite of those problems, the sales should be certificated.[6] New York reiterated its position in a petition for rehearing before the FPC.[7]

In *Sinclair,* New York raised the issue in the same terms as in the *Hawkins* proceeding.[8] And again, after the FPC refused to consider the issue, New York repeated its contentions in a petition for rehearing.[9] Since New York presented the issue of public need in its petition for rehearing in both the *Hawkins* and *Sinclair* proceedings, our review is authorized by Section 19(b) of the Natural Gas Act.[10]

The most obvious element of public necessity is the demand for the gas. In several cases decided before CATCO, the existence of an unsatisfied market was considered of great importance. For example, in *Oklahoma Natural Gas*

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[4] New York claimed that the pipelines were obligated to take or pay for more gas than they could use. [Footnote added.]

[5] H.A. 268.

[6] This argument is analogous to the argument that the FPC must give reasons why a certificate should be granted even though the price is out of line. The out-of-line price alerts the FPC to the potentially harmful situation. See *Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378 (1959) (CATCO).

[7] H.A. 311-12.

[8] S.A. (*Sinclair* Joint Appendix) 198.

[9] S.A. 243-44.

[10] 15 U.S.C. § 717r (b) (1964).

Co. v. *Federal Power Commission*[11] the court allowed the need in the Chicago market to outweigh even considerations of the price of the gas. And in *United Gas Improvement Co.* v. *Federal Power Commission*,[12] because the demand for the gas was shown to be great, the court did not insist that the FPC regulate the initial price.[13]

Since these cases were decided, the Supreme Court has held, in CATCO, that the initial price is extremely important. But CATCO does not suggest that the public's need for the gas is irrelevant. Indeed, the Court seems to have imposed on the producer the burden of proving public need before certification. In part, the Court reversed the Commission's certification in CATCO because there was no "support whatever in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas.'"[14]

But market demand is not the only relevant factor. In the *Transco* case,[15] the question was whether the FPC, "through its certification power, may prevent the waste of gas committed to its jurisdiction."[16] The Supreme Court said "no one [disputed] that natural gas is a wasting resource and that the necessity for conserving it is paramount."[17] The dispute was whether the "public conven-

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[11] 103 U.S.App.D.C. 256, 257 F.2d 634, *cert. granted*, 358 U.S. 877 (1958), *cert. dismissed*, 358 U.S. 948 (1959).

[12] 269 F.2d 865 (3d. Cir.), *vacated sub nom. Public Service Commission* v. *Federal Power Commission*, 361 U.S. 195 (1959).

[13] See also *Department of Conservation* v. *Federal Power Commission*, 148 F.2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), in which the court allowed the need for the gas to outweigh evidence that the gas was going to be put to an inferior use.

[14] *Supra* note 6, at 393.

[15] *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961).

[16] *Id.* at 8.

[17] *Ibid.*

ience and necessity," referred to in § 7(e) of the Natural Gas Act, included considerations of conservation, or whether the FPC was precluded from considering that factor. In affirming the Commission's action, the Court decided that conservation was relevant to public convenience and necessity. *Transco* was a pipeline certificate case, and the instant case is a producer certificate case. But pipelines and producers are certificated under the same statute, and, at least without strong evidence, we should not say that conservation is relevant in one case and not in the other. The public's interest in conserving gas is no less when the applicant for a certificate of public convenience and necessity is a producer.

The parties do not explicitly deny the relevance of market demand and conservation, but we are asked to disregard the issue of public need for four other reasons. First, it was not properly raised below. We have already dealt with that argument. Second, the public need for the gas should be determined in a pipeline certificate or pipeline rate case, not in a producer certificate case. Third, the FPC can postpone consideration of public need until it completes its pending rule-making proceeding on the problem of take-or-pay contracts. And fourth, "because of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for future, even though the supplies may be slightly in excess of their present-day needs." [18]. We will deal with the last three contentions in turn.

1. According to New York, the issue of public need should not be decided only in a pipeline certificate or rate case. New York argues that if the gas is sold to a pipeline which is unable to use it, and if the pipeline must either take the gas or pay for it nonetheless, then

[18] H.A. 280.

the loss sustained by the pipeline will be reflected in the price charged to the public utility and ultimately in the price charged to the consumer. The FPC could eliminate this problem by ruling that the pipeline's investment in the unused gas was "imprudent" and refusing to allow the pipeline to add its cost to the rate base. However, the FPC has cited no case in which the cost of unused gas was eliminated from the rate base. To the contrary, there is some indication that the FPC may be allowing at least part of the loss to be shifted to the consumer.[19] Indeed, it would seem difficult for the FPC first to certificate a sale to a pipeline and then to claim that the pipeline's investment in the gas was imprudent.

Regardless of how the FPC uses its "imprudent investment" doctrine, there is another reason why the public's need for the gas must be considered in a producer certification. As we have indicated, the FPC must prevent waste of natural gas. One of the most important ways is to control and limit the end uses of gas.[20] The FPC must compare various uses and determine which ones are more economically necessary. If the proposed sale is to a consumer who will use the gas in an economically "inferior" way then the sale is not certificated. Of course, to do the job properly the FPC must consider *all* alternative uses.[21] It recognizes this responsibility in pipeline certificate cases.[22] But if it refuses to consider the issue in producer certificate cases and waits for pipeline cases, some of the alternatives will already have been eliminated.

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[19] See *United Gas Pipe Line Co.*, 31 FPC 1180, 1191-92 (1964), and *United Gas Pipe Line Co.*, 32 FPC 1515, 1519 (1964).

[20] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15, at 8.

[21] "[Section] 7(e) requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Co.* v. *Public Service Commission*, *supra* note 6, at 391. [Emphasis added.]

[22] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15.

In the pipeline case the FPC can direct the gas towards one rather than another of the pipeline's customers but without considering the customers of other pipelines which might have bought the gas. Thus, the gas may go ultimately to consumers whose use will be less economically beneficial than the use of other potential purchasers.

Because the FPC refused to consider the issue of need, this record does not indicate whether or not this gas has been wasted.[23] However, such wasting is a possible result of the alleged oversupply situation of some of the pipelines here.[24] The possibility that gas may be wasted requires that the FPC determine the issue of need *before* the initial sale to a pipeline. Otherwise it may be too late to protect the public interest.[25]

2. The FPC argues that "insofar as there may be any [take-or-pay] problem for [the pipelines in the instant case], it is one not peculiar to them and may therefore be resolved . . . by the Commission's reservation of the matter for consideration in the pending rulemaking proceeding on that subject. . . ."[26] As we have noted, though, the take-or-pay problem does not exhaust the considerations relevant to an informed decision about the public's need for the gas. It is unlikely that any decision the Commission makes in its rule-making proceeding would deal with the entire "need" issue. The rule-making proceeding on which the FPC relies

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[23] We do not know whether anyone else could have taken the gas, or, if so, whether he served markets which would differ from the markets served by the pipelines here.

[24] There is a suggestion that the gas involved in this case was obviously needed because some of it has already been consumed. The issue of need, however, is not decided simply because someone will consume the gas. The real questions are whether the consumer was forced, or will be forced, to pay more for the gas because of the pipeline's poor take-or-pay situation and whether the gas could have been put to a superior use.

[25] See *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[26] Brief for Respondent, p. 29.

has been pending for five and a half years,[27] and we do not know when a decision will be reached. We can only speculate about what that decision will be and how it will apply to the question of public need. We think such an uncertain proceeding should not excuse the Commission from its present responsibilities.[28]

3. The FPC's last argument is that the "nature of the gas business and the obligation of pipeline companies to the consuming public" sometimes require a poor take-or-pay situation.[29] If this means that other considerations may outweigh the pipeline's poor take-or-pay situation, we agree. And these considerations may also outweigh the considerations of conservation inherent in the case. But there is no evidence in the record which indicates what these considerations are or how they are relevant to this certification. If public convenience and necessity requires this certification, this must appear from something more than the FPC's broad and unsupported statement about the "nature of the gas business" in a case where the FPC thought the issue irrelevant.[30]

Although we remand this case so that the FPC can consider the issue of public need, we recognize an obvious ten-

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[27] Docket No. R-199, 26 Fed. Reg. 4615 (May 22, 1961).

[28] See *Public Service Commission* v. *Federal Power Commission*, 117 U.S.App.D.C. 287, 292-93, 329 F.2d 242, 247-48, *cert. denied sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963 (1964). A day before this opinion was issued, we were informed that the FPC completed its rule-making proceeding on January 18, 1967. The new rule does not affect our decision to remand this case for a determination of public need. That rule is subject to further review. In any event, we think the FPC should decide, in the first instance, how the new rule relates to the issue of whether the public needs the gas involved in this case. Therefore, on the remand we order herein, the FPC will make that determination according to the principles stated in this opinion. See discussion following note 30 *infra*.

[29] H.A. 280.

[30] In CATCO the Supreme Court also rejected an unsupported statement about the public need. *Supra* note 6, at 393.

sion between the statutory requirement that it do so and administrative feasibility. The public convenience and necessity includes many considerations, but if there is to be any effective certification of producers the FPC must sometimes stop short of the ideal.[31] It is evident, too, that the FPC must have great latitude in its choice of procedures. We are not demanding that the FPC hold a long and complex hearing in each of its many producer application cases. But it does not seem too difficult to have the producer's customers or the pipeline's customers testify about the take-or-pay situation.[32] Regarding the broader aspects of the "nature of the gas business" or of conservation, the FPC may consider studies of its staff. It may, after study, issue policy statements. These studies or statements may be relevant to large geographic areas, or perhaps to the whole gas industry. Then it would not be necessary to relitigate need in each case; the FPC need only show that the broad statement or study covers the particular certification before it. In short, we do not now prescribe any particular method for deciding need. Nor is our discussion of what public need means exhaustive. We decide only that when a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a

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[31] *Cf. United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223 (1965). *Callery* does not apply directly though. There, no one doubted the need for the gas. The dispute was over the price. The longer it took to set the price, the more the consumer was hurt. Understandably, the Supreme Court wanted the Commission to act quickly and efficiently. The entire purpose of the Act is to protect the consumer. Here, New York claims that this sale should not be certificated at all, no matter at what price and no matter how quick the procedure. It is counter-productive to streamline procedure when the effect is to prevent the Commission from considering the possibility that the sale itself would not be in the public interest.

[32] Or perhaps the Commission can rely upon a previously decided producer or pipeline certificate case if the decisions there are relevant to the applications pending before the Commission.

permanent certificate to a producer.[33] "[A] certificate shall be issued . . . authorizing the . . . sale . . . if . . . the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."[34]

II

The In-Line Price

The second major dispute in this case concerns the FPC's determination of the in-line price. Since the CATCO decision, the FPC has been granting permanent certificates of public convenience and necessity only if the price of the gas is in-line. The question is, in line with what? Judging from these and other FPC proceedings, the "line" is determined as follows: First the Commission chooses a time period and a geographical area which it considers relevant[35] and lists all the prices at which gas was sold at that time and in that area. Then it eliminates prices which are "suspect" either because they are presently under litigation or Commission review or because they are similar to a price under a cloud.[36] When the price array is completed the FPC makes several calculations, for example, the average price, the median price,

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[33] *Cf. Federal Power Commission* v. *Texaco*, 377 U.S. 33, 42-44 (1964), and *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 525-26 (1964).

[34] 15 U.S.C. § 717f(e) (1964).

[35] Here the area for the *Hawkins* proceeding was Texas Railroad District No. 3, and the area for the *Sinclair* proceeding was Texas Railroad District No. 2. In both proceedings there were two relevant time periods—in *Hawkins* from January 1, 1958, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to January 1, 1964, (post-Policy Statement period), and in *Sinclair* from January 1, 1957, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to March 10, 1964, (post-Policy Statement period).

[36] See, *e.g.*, *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 (1961).

the weighted average price, and the price at which substantial volumes of gas flowed in interstate commerce. The FPC adjusts some of these prices by assigning differing weights to the various prices which form the price array. At least one Commissioner in our case gave some weight also to a guideline price announced first in 1960 and subsequently revised.[37] The Commission considers these weights and the adjustments, and then picks a price.[38] Here the Commission set the in-line price at 15¢ per Mcf for District No. 2 during the period before the Policy Statement (September 28, 1960) and at 16¢ for the post-Policy Statement period.[39] For District No. 3, the prices were 16¢ and 17¢ respectively.

The petitioners have many disagreements with what the FPC did in this case. Continental and Superior think the Commission should have given more weight to certain 20¢ sales which were permanently certificated, to sales which were temporarily certificated, and to contract prices even before these prices are tested in any kind of certificate proceeding.[40] They also claim that the Commission erroneously considered certain sales at 14¢ and less, erroneously excluded intrastate sales, and erroneously used estimated rather than actual volumes when calculating weighted average prices. In short, they claim that the Commission acted arbitrarily and without any recognizable standards.

New York claims that the FPC should have given no weight to contract prices or to sales made pursuant to

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[37] See Commissioner Bagge's concurring opinion in *Hawkins*. H.A. 297.

[38] The proceedings in this case provide some examples of the Commission's methods. See the appendix attached to this opinion.

[39] The pre- and post-Policy Statement periods are described fully in note 35 *supra*.

[40] Their claim that the Commission disregarded these prices cannot be based on the record in this case. See, *e.g.*, S.A. 226 and H.A. 285-86 quoted in the appendix *infra*. The producers' claim is reduced to the contention that not enough weight was given.

temporary certificates, and that it erroneously considered certain permanently certificated prices. New York says these permanently certificated prices were incorrectly determined and therefore should not be allowed to affect subsequent in-line prices.

To properly weigh these claims we must understand the purpose of in-line pricing.

In-Line Pricing

The concept of an in-line price is an artificial one created by the Supreme Court, the Courts of Appeals, and the Commission for the sole purpose of protecting the consumer. Before the concept existed, the FPC usually proceeded in the following way. A producer who wanted to sell gas in interstate commerce applied to the Commission for a certificate of public convenience and necessity under § 7 of the Act. When the certificate was granted, the producer-seller and the pipeline-buyer executed the sale at a price which they had already negotiated. If that price was too high, the FPC, either on its own motion or acting on the complaint of an interested party, could institute proceedings under § 5 of the Act to determine the "just and reasonable" price, after which the producer was forced to lower his price accordingly. However, since § 5 does not provide for refunds, the producer was allowed a "windfall" (with a consequent "squall" for the consumer) during the period between commencement of the sales and the conclusion of the hearing under § 5.[41] Section 5 hearings were long and complicated, and the windfall could be quite large. The ordinary protections of the market place did not exist in this regulated monopoly industry. The producer, of course, was interested in extracting the highest price from the buyer. But the buyer did not have an equal interest

[41] *Atlantic Refining Co.* v. *Federal Power Commission*, *supra* note 6, at 390.

in keeping the price down because the price he paid became part of his rate base and was ultimately paid by the consumer.[42] Presumably the consumer did not have any choice except to buy the fuel at the price which was set.[43]

The procedure after the invention of in-line pricing changed in one significant way. Now, when the FPC grants a certificate of public convenience and necessity, a price condition is usually attached. A dissatisfied producer who wants to sell at a higher price can file a new rate schedule under § 4 of the Act subject to his contract with the pipeline.[44] These rates become effective after thirty days unless challenged by the FPC. Even if challenged, the new rates become effective after five months if the Commission has not completed its "just and reasonable" determination by that time. Eventually, then, the producer may charge whatever price he wants.[45] However, by filing under § 4, the producer becomes subject to payment of refunds if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices.[46]

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[42] *Atlantic Refining Company* v. *Federal Power Commission*, 115 U.S.App.D.C. 26, 28 at n. 11, 316 F.2d 677, 679 at n. 11, (1963).

[43] *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F.2d 133, 135 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823 (1961).

[44] *Cf. Texaco* v. *Federal Power Commission*, 290 F.2d 149, 156 (5th Cir. 1961).

[45] The Commission may, however, impose a temporary moratorium on price increases. See *United Gas Improvement Co.* v. *Callery Properties, supra* note 31. A price moratorium was imposed in the instant case, but it is not before us on appeal.

[46] The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. *Atlantic Refining Co.* v. *Public Service Commission, supra* note 6, at 388.

The Use of Contract Prices

From the description of in-line pricing it is evident that the FPC cannot use the prices at which producers and pipelines contract as a basis for setting the price. The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control.[47]

One Court of Appeals has viewed the Commission's reliance on contract prices as the reason for the CATCO opinion.

> [W]e perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the [following] criticism . . .: that the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned*, that they had been bargained for at arm's length, or that they were not higher than a price someone else was then paying in the area.[48]

And this court has been wary of allowing the Commission to avoid its responsibility by relying on prices negotiated in the market place.[49]

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[47] See *Atlantic Refining Company* v. *Federal Power Commission*, *supra* note 42, at 28, n. 11, 316 F.2d at 679, n. 11.

[48] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 43, at 135-136. [Emphasis in the original.] See also *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F.2d 147, 148 (5th Cir.), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965 (1961).

[49] *Public Service Commission* v. *Federal Power Commission*, 109 U.S.App.D.C. 289, 291, 287 F.2d 143, 145 (1960), and *Public Service Commission* v. *Federal Power Commission*, 109 U.S.App. D.C. 292, 296, n. 4, 287 F.2d 146, 150, n. 4 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Public Service Commission*, 365 U.S. 880 (1961).

The Use of Temporary Certificates and the Policy Statement

If the Commission relies on prices over which it has never exercised control, it effectively abdicates its responsibility to protect consumers. Although prices contained in temporary certificates are not completely without Commission control, neither are they subjected to thorough consideration. According to the statute, temporary certificates are granted only "in cases of emergency" pending determination of an application for a permanent certificate. Temporaries are granted in *ex parte* proceedings "without notice or hearing."[50] No record is made, so it is impossible for a court to know on what basis the Commission granted the certificate. Accordingly, standards on review are minimal. This court has upheld a temporary certificate although we admitted that the summary nature of the proceeding precluded us from passing intelligently upon the parties' contentions.[51]

Recently, though, the FPC has attempted to make temporary certification a more considered decision. In 1960 it promulgated a Policy Statement which included guideline prices beyond which it would not certificate sales, even temporarily. In theory, the Policy Statement could justify inclusion of temporary certificates in the permanent certificate price array, since the Policy Statement could provide some degree of intelligent control over temporary prices.

In fact, however, the Policy Statement has not had a curative effect. The FPC itself seems to give the Statement very little (and very ambiguous) weight. In its first

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[50] 15 U.S.C. § 717f(c) (1964).

[51] *Public Service Commission* v. *Federal Power Commission*, 117 U.S.App.D.C. 195, 199, 327 F.2d 893, 897 (1964). See also *American Liberty Oil Co.* v. *Federal Power Commission*, 301 F.2d 15 (5th Cir. 1962). And see *Public Service Commission* v. *Federal Power Commission, supra* note 28, at 294, 329 F.2d at 249, in which this court characterized temporary certificates as being "without notice or hearing or mature consideration."

statement, the FPC said that "these price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights."[52] When the State of Wisconsin petitioned this court to review the Policy Statement, the FPC moved for dismissal on the ground that the Policy Statement "does not modify the procedures under which certificates are granted. . . . It denies no rights and imposes no obligations."[53] We agreed and dismissed Wisconsin's petition for review.[54] The Commission has repeatedly held that the Policy Statement does "not purport to fix the 'in-line' price."[55] And recently the Commission characterized the guideline prices as being relevant only when "no protests or petitions to intervene [are] filed" in the certification proceeding.[56] In the instant case, only one Commissioner relied upon the guideline prices; two ignored them, and two felt that reliance upon the Policy Statement would be impermissible.

Further, we cannot know whether the guideline price actually controls temporary prices unless we know what the guideline price is based on. For example, it is conceivable that temporary certificates have significant influence upon the guideline price. If so, the guidelines do not control temporary prices. In any event, it is impossible to determine how the guidelines were set. The Commission listed a number of very general factors but was not specific about what the factors were or how they were considered. When

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[52] 24 FPC 818, 819 (1960).

[53] *Wisconsin* v. *Federal Power Commission*, No. 16118 Motion to Dismiss, p. 2 (1961).

[54] *Wisconsin* v. *Federal Power Commission*, 110 U.S.App.D.C. 260, 292 F.2d 753 (1961).

[55] *Amerada Petroleum Corp.*, 29 FPC 171, 172 (1963), *Union Texas Petroleum*, 29 FPC 273, 275 (1963), *Union Texas Petroleum*, 29 FPC 733, 734 (1963).

[56] 30 Fed. Reg. 4670, 4671 (1965). See also *Amerada Petroleum Corp., supra* note 55, at 172 and *Union Texas Petroleum*, 29 FPC at 275 (1963).

asked, the FPC refused to disclose the basis for its determination.[57]

A still more persuasive reason for eliminating temporary prices from the permanent price array is the way their use may injure consumers. The effect may be a slow escalation of in-line prices: An in-line price is set; the guideline price is set somewhat higher; temporary certificates are granted at the guideline price; the new temporary certificates are used in determining a new in-line price, which will be higher than the first in-line price; the new in-line price raises the guideline price; and then the spiral begins again. Although, in fact, we cannot isolate so clearly the effect of the temporaries and the guidelines, there can be no doubt that an escalation has occurred, and in a manner similar to the process described.[58] This process contradicts CATCO's admonition to hold the line in the interim period between the sale of gas and the determination of just and reasonable rates. According

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[57] See, *e.g.*, Nos. 7781, *et al.*, *Sunray DX Oil Co.* v. *Federal Power Commission*, (10th Cir. Dec. 9, 1966), Op. pp. 15-19; *Amerada Petroleum Corp.*, *supra* note 55.

[58] In *Texaco Seaboard*, 29 FPC 593 (1963), the Commission found the Texas Railroad District No. 3 in-line price to be 16¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 17¢. 29 FPC 590 (1963). Now the Commission finds that the in-line price for District No. 3 has jumped to 17¢.

In *Hassie Hunt Trust*, 30 FPC 1438 (1963), the Commission found the District No. 2 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 30 FPC 1435 (1963). Now the Commission finds that the in-line price for District No. 2 has jumped to 16¢.

In *Skelly Oil Co.*, 28 FPC 401 (1962), the Commission found the District No. 4 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 28 FPC 441 (1962). Recently the Commission found that the in-line price for District No. 4 has jumped to 16¢. See *Sunray DX Oil Co.* v. *Federal Power Commission*, *supra* note 57.

to CATCO, one reason why the consumer needs protection during the interim period is that the period is often long.[59] Under the present administration of the in-line price doctrine the amount of protection for the consumer decreases as the length of the interim period increases. The longer it takes to determine a just and reasonable price, the higher the in-line price becomes, and the consumers' potential refund drops accordingly.

There is a final, and completely separate, reason why temporary prices should not affect the in-line price. The first court to discuss in-line prices held that prices which were suspect because they were under a cloud of court or Commission review could not be used in the permanent price array.[60] Since then almost every court,[61] including the Supreme Court,[62] has accepted the suspect price doctrine. The suspect price doctrine clearly includes temporarily certificated prices. Temporarily certificated prices may be, and often are, changed by the Commission. They are "subject to judicial review." [63] Prices that are so particularly subject to the hazard of change do "not provide a reasonably reliable basis upon which to predicate a price line." [64] And, acceptance of temporarily certificated prices has, in fact, had the effect of "creating a standard by which the questioned rates [are] judged." [65]

The producers argue, contrary to our holding, that temporarily certificated prices and contract prices must

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[59] *Supra* note 6, at 389.

[60] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 36.

[61] See, *e.g.*, *Public Service Commission* v. *Federal Power Commission*, 109 U.S.App.D.C. 292, *supra* note 49 and *Public Service Commission* v. *Federal Power Commission, supra* note 28.

[62] *United Gas Improvement Co.* v. *Callery Properties, supra* note 31, at 227.

[63] *Ibid.*

[64] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 36, at 824.

[65] *Ibid.*

influence the in-line price. They rely on suggestions in some opinions that the line should "reflect current conditions in the industry."[66] This argument was adopted recently by the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*[67] which held that it is permissible for the FPC to consider temporaries and contract prices.

However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated.[68] On this basis the court refused to apply the suspect price doctrine and approved the FPC's method of determining the in-line price. "[W]hen no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries."[69] In our case there is a substantial volume moving under permanent certificates.[70] We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.

Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need.

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[66] See, *e.g.*, *ibid.*

[67] *Supra* note 57.

[68] *Supra* note 57, at Op. p. 24.

[69] *Supra* note 57, at Op. p. 26.

[70] See, *e.g.*, H.A. 282, 284-86, 299-300; S.A. 220, 223, 226-27.

We are not suggesting, of course, that current conditions are never relevant to the FPC. In a § 4 or § 5 hearing the FPC considers current conditions in order to set a just and reasonable price. However, the courts have already rejected attempts to import standards relevant to § 4 and § 5 hearings into § 7 hearings. For example, in *Callery* the producers tried to introduce economic and financial evidence, but the FPC disregarded it.[71] The Fifth Circuit reversed the Commission. In essence the court said that this evidence was relevant to current conditions in the industry, and that these conditions were relevant to the determination of the in-line price.[72] The Supreme Court rejected this argument summarily. "To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices."[73] In the recent Tenth Circuit case the producers tried to introduce the same kind of evidence. The court responded:

> The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity.[74]

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[71] See *Callery Properties* v. *Federal Power Commission*, 335 F.2d 1004, 1009 (5th Cir. 1964), for a description of the evidence.

[72] *Id.* at 1013.

[73] *Supra* note 31, at 227-28. In CATCO the Supreme Court had already recognized the difference between the standards of a § 7 and a § 4 or § 5 proceeding. "[T]he Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." *Supra* note 6, at 390.

[74] *Supra* note 57, at Op. pp. 14-15.

We think this response, which is properly based on the logic of *Callery* and CATCO, is inconsistent with the same court's acceptance of temporaries and contract prices. If the courts and the FPC will not allow consideration of evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions.

The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. For example, in a particular case, the FPC may feel that an in-line price which is too low subjects the producers to too much risk. And this risk may endanger investment in the industry. In that event the FPC would have to weigh this danger against the diminution of consumer protection. But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection.

Finally, it is argued that elimination of temporarily certificated and contract prices from the price array will cause a "price-freeze." But our proposed decision will not freeze the price of gas. If the producer is dissatisfied with the in-line price he can file a new, and higher, rate schedule under § 4 of the Act.[75] Neither will our decision permanently freeze the in-line price for an area. We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price

[75] See note 45, *supra*.

to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing. But we do not hold that the FPC can never raise the price line in the interim period. We hold only that the Commission has advanced no reason why an escalation is justified in this case.

Other Claims Regarding the In-Line Price

New York argues that the FPC erroneously determined the pre-Policy Statement in-line price for District No. 3, because it gave weight to prices "tainted" by other prices which were permanently certificated in 1956-57. New York thinks these 1956-57 prices were incorrectly certificated "in light of *CATCO* and the subsequent court cases."[76] Although sometimes it may be wise to re-examine certificated prices, we think that the FPC may give weight to permanently certificated prices even if they were certificated under standards later changed by the courts. This area of the law is constantly changing, and if we require the Commission to re-examine earlier certifications whenever there is a new decision, hearings under § 7 will never end. The proper rule was stated by the Ninth Circuit.

> No doubt there are many certificated prices—some under unconditional certificates and others . . . conditioned, some established in contested proceedings and others not contested—which might be different, and lower, if the Commission were passing on them under section 7 today. But this, we think, does not *require*, although it may *permit*, the Commission to disregard them or to give little weight to them in deciding what is an appropriate price line to which to refer.[77]

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[76] Brief for Petitioner, p. 27.

[77] *California* v. *Federal Power Commission*, 353 F.2d 16, 23 (1965). [Emphasis in the original.]

Though the FPC is not required to re-examine permanently certificated prices, neither is it required to include a price in the price array simply because the price was sanctioned in a permanent certificate. The Commission may ignore a price if it has a good reason to do so.[78] In this case, over Superior's objection, the Commission refused to give full weight to certain 20¢ sales. According to the FPC these and similar sales should be discounted because "they either have subsequently been set aside . . . or would have been set aside . . . save for the procedural defect in the PSC review action."[79] This reason is adequate, and we do not think the Commission abused its discretion by not giving full weight to the 20¢ sales.

Lone Star Gathering Company

New York claims that Lone Star is a gathering company rather than a pipeline, and therefore sales to Lone Star should be certificated at the in-line price less the cost of gathering. Since oral argument we have been informed that in Opinion No. 505 the FPC granted Lone Star and United Gas Pipe Line Company permission to consolidate some of their facilities.[80] The FPC was to rehear that case beginning December 6, 1966.[81] Since we do not know what effect the Commission's final decision will have on the issue before us, we reserve decision on New York's claim.

We need not deal with any of the other contentions regarding the in-line price. Some of the parties may now wish to abandon some of their claims. On remand the FPC can deal with the remaining claims according to the principles announced in this opinion.

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[78] A price which is not "comparable" is not considered even if it is permanently certificated. See *United Gas Improvement Co. v. Federal Power Commission, supra* note 36, at 823.

[79] H.A. 284.

[80] *Lone Star Gas Company, et al.*, Docket Nos. CP65-118, *et al.*, issued August 22, 1966.

[81] Order issued October 14, 1966.

III

Refunds

New York argues that the FPC erroneously postponed a decision about whether the producers must refund amounts which were collected, pursuant to temporary certificates, in excess of the in-line level set in the permanent certificate. The FPC answered that it had been awaiting the Supreme Court's action in the *Callery* case which was not decided until December of 1965.[82] According to the FPC's brief, its decision in this case "should be forthcoming in the near future" now that the Supreme Court has decided *Callery*.[83] The Commission took its promise seriously, and on July 22, 1966, it issued Opinion No. 498 which required refunds from some of the producer-applicants involved in the *Hawkins* proceeding.[84] We may assume that a decision in *Sinclair* will follow.

IV

Interest Rates

Superior attacks the FPC's order which sets interest rates for some refunds at 7% and for others at 4½%. Since Superior did not make this objection in an application for rehearing before the Commission, we cannot deal with the claim.[85] In any event, at least on the record and briefs now before us, the Commission's justification for the 7% interest rate seems reasonable.

The Commission's order will be set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

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[82] *Supra* note 31.

[83] Brief for Respondent, p. 37.

[84] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.* Docket Nos. G-18077, *et al.* The order was amended in Opinion No. 498-A (December 6, 1966).

[85] 15 U.S.C. § 717r (b) (1964). *Cf. Utah Power & Light Co.* v. *Federal Power Commission*, 339 F.2d 436 (10th Cir. 1964).

WILBUR K. MILLER, *Senior Circuit Judge,* dissents.

APPENDIX

Statements Explaining the Method Used to Determine the in-Line Price

In *Hawkins* the hearing examiner explained his decision in the following terms:

> It will be observed from the foregoing distribution of prices for the period September 28, 1960 through December 31, 1963 [the price array], that the largest concentration of sales occurred at 14 cents and 15 cents per Mcf, and that the largest volumes of gas were sold at or below 15 cents per Mcf—more than 80 percent. The average sales price for the period was approximately 14.67 cents and the average sales price by volume was approximately 15.51 cents per Mcf. In respect to the period January 1, 1958 through September 27, 1960 more than 73 percent of the sales occurred at 16 cents or below and these sales account for more than half the volume. The average sales price for this period is 15.41 cents per Mcf and the average sale price by volume is approximately 16.76 cents per Mcf. When the two periods are combined (January 1, 1958 through December 31, 1963) it is apparent that there are two major concentrations of sales namely at 14 cents and 15 cents and minor concentrations at 13.5, 14.5, 16.2 and 20 cents. The average price of the 94 sales is 15.11 cents per Mcf and the average by volume is 16.43 cents per Mcf.
>
> In view of the foregoing and the evidence adduced there is ample support for finding that 16 cents per Mcf at 14.65 psia is an appropriate "in line" price applicable to producer contracts in this proceeding for the period prior to September 28, 1960. The Staff witness found, however, that 16.2 cents was the appropriate "in line" price applicable to the period following September 28, 1960 and in doing so stressed the significance of the sales which were made at 16.2 cents per Mcf. (Four sales before September 28, 1960 and three afterwards.) We do not think that

this is decisive. Indeed there is evidence which tends to show that a higher price may be justified for the pre-Policy Statement period than for the post-Policy Statement period.

It is manifest that the "in line" price is neither the highest price nor the lowest price at which gas is sold from a particular area in interstate commerce. It is also clear that it is not the general average of prices at which gas is sold in a particular period or indeed the mathematical weighted average. Consideration necessarily must be given, however, to the number of sales as well as to the volume—large volumes frequently selling at higher prices than low volumes. Consideration should be given to numerous factors depending upon individual circumstances from one case to another. Consideration must also be given to the Commission's Statement of General Policy No. 61-1, and to policy of the Natural Gas Act as heretofore construed by the Commission and by the courts particularly by the United States Supreme Court in the CATCO case. *Atlantic Refining Co.* v. *P.S.C.*, 360 U.S. 378. In view of these factors and all the facts of record we conclude that the subject sales in this proceeding from the Texas Railroad District No. 3 made under contracts executed both before and after the Policy Statement dated September 28, 1960 should be conditioned at a price no greater than 16 cents per Mcf at 14.65 psia. H.A. 248-50.

When the Commission reviewed the examiner's initial decision, it explained the method as follows:

> For the pre-Policy Statement period we agree with the examiner that 16 cents per Mcf . . . is the appropriate in-line price. . . . As can be seen from the table above [the price array], there are comparatively large volumes of gas sold at the 16.0 and 16.2-cent levels, small volumes at 17.5 and 18.0, and very large volumes at 20 cents. 38 sales (72 percent) are at 16 cents or below, while a little more than half the volume is sold at 16 cents or below. . . . Arithmetically the large volumes at 20 cents would have a strong effect on the weighted average of 15.16 cents per Mcf, but these should be discounted. . . .

> The producers, on the other hand, argue that the 20 cent sales, if not given full weight, should be given some weight. The Commission adopted this consideration in *Sun Oil Co.* . . . A ceiling at 16 cents for the pre-Policy Statement period, in effect, gives some weight to the prices above 16 cents as well as the contract prices and the prices under temporary certificate, for if we gave no consideration to the prices above 16 cents, the ceiling would be set at a lower level, since ordinarily we do not set the ceiling price at the highest level.
>
> As for the post-Policy Statement period, it may be observed that there are nine sales and moderate volumes at 15 cents, three sales and moderate volumes at 16.2 cents, one sale and a small volume at 16.5 cents, and three large sales at 18.0 cents. As the producers argue, the fact that the 18-cent prices were established in abridged hearings should not detract from their weight in setting the line. . . .
>
> We are of the opinion that 17.0 cents per Mcf . . . is the in-line price for the period following September 28, 1960. It is our judgment that this conclusion gives appropriate weight to the comparatively large volumes sold under permanent certificates at 18.0 cents per Mcf while reflecting the weighted average price of 16.17 cents per Mcf. In addition, a 17.0 cent price clearly gives some weight to the unconditioned contract prices and to the prices under temporary certificates. Finally, some 43 percent of the gas has been permanently certificated at a price higher than 17.0 cents. One proposed sale . . . is at 17.0 cents, under a contract dated October 1, 1963. Giving due consideration to all sales in the area during the period in question, an in-line price of 17.0 cents is fully justified. H.A. 284-286.

In *Sinclair* the trial examiner determined the pre-Policy Statement in-line price as follows:

> Applying the criteria for the determination of an in-line price, as developed by the numerous Commission and Court decisions following Catco, to the data in the foregoing tabulation, resulted in a numerically weighted average price of 16.68 cents per Mcf and a

volumetrically weighted average price of 17.18 cents per Mcf. In according the proper evidentiary weight to the evidence of record, most reliance or the greatest weight has been accorded the 14 permanently certificated sales with an estimated first months' delivery volume of 460,575 Mcf. These sales and volumes do not "reflect current conditions in the industry" because of their limited nature. Having accorded the greatest weight to the permanently certificated sales and in giving appropriate consideration to temporary certificated sales at substantial volumes presently moving in interstate commerce, it is concluded the public convenience and necessity requires the natural gas here under consideration at an in-line price of 16.0 cents per Mcf at 14.65 psia.

The in-lineness of the 16.0 cents per Mcf here determined may be further demonstrated. The Commission said in *Texaco-Seaboard Inc., et al.*, 27 FPC 482, 485, and *Hassie Hunt Trust (Operator) et al.*, 30 FPC 1438, 1445, ". . . as brought out in *Catco* and . . . in Texaco-Seaboard, the price line does not accord with the highest price or prices permanently authorized but falls between the highest group of prices and the median price." Applying this test to Staff Chart 3, Exhibit 4, [the price array] . . . , reveals a median price of 14.57 cents (volumetric weighted average) which, when averaged with the highest price of 17.59 cents, produces an in-line price of 16.08 cents per Mcf.

A similar test further illustrates the in-lineness of the 16.0 price per Mcf.

Using *all* permanently (77) and *all* temporarily (35) certificated sales related to *all* volumes of natural gas (4,390,500 Mcf) moving in interstate commerce during the period after September 28, 1960, and through March 10, 1964, from District No. 2, a volumetrically weighted average price of 15.15 cents per Mcf is indicated. This median price when averaged with the highest temporarily certificated price of 18.00 cents per Mcf produces an in-line price of 16.57 cents per Mcf. S.A. 181-82.

Of the post-Policy Statement in-line price, the examiner said:

> For the 22 sales being made in the 14.0 to 14.75 cent price level in the above tabulation [the price array]

the numerically weighted average price is 14.25 cents and the volumetrically weighted average price is 14.35 cents per Mcf at 14.65 psia. However, the numerically weighted average price for the 29 sales is 14.58 cents per Mcf and the volumetrically weighted average price is 14.84 cents per Mcf at 14.65 psia. Considering the foregoing data and the evidence of record showing the history of prices and the price patterns in District No. 2, the Examiner is of the opinion that the present or future public convenience and necessity requires the natural gas here under consideration at an in-line price of 15.0 cents per Mcf at 14.65 psia. S.A. 185-86.

The Commission further explained the method of selecting the post-Policy Statement in-line price as follows:

A totaling of all permanently and temporarily certificated sales in District No. 2 under contracts dated after September 28, 1960 and through March 10, 1964, exclusive of the sales to Valley at 14 cents, shows a listing of 101 sales involving a combined estimated first month volume of 4,060,388 Mcf. The median price on a volumetric basis is 16.00 cents and the volumetric weighted average price is 15.29 cents. Approximately 53 percent of the estimated first month volume covered by these sales moved in the price range of from 16 cents to 18 cents. On the basis of these calculations, and with recognition of the fact that the temporarily certificated sales represented most of the sales above the 16 cents price level, and should not be accorded undue weight, and giving some weight to the unconditioned contracts we conclude that the price of 16 cents per Mcf represents the correct post-policy in-line price of jurisdictional sales of natural gas in District No. 2. In reaching this result we may observe that if we confined ourselves to permanently certificated sales we would not find a line as high as 16 cents, for the next highest sales are at the 15.25 cents level. S.A. 225-26.

UNITED STATES COURT OF APPEALS

Tenth Circuit

Nos. 7912, 7962, 8115, 8116, 8118,
8119, 8121, 8122, 8123, 8124, 8125

January Term, 1967

Pan American Petroleum Corporation; E. Cockrell, Jr.; Continental Oil Company; Freeport Sulphur Company; General American Oil Company of Texas; J. Ray McDermott & Co., Inc.; Placid Oil Company, *et al.*; Shell Oil Company; The Superior Oil Company; and U.S. Oil of Louisiana Inc.,

Petitioners,

v.

Federal Power Commission,

Respondent.

Long Island Lighting Company; Philadelphia Electric Company; Philadelphia Gas Works Division of the United Gas Improvement Company; Public Service Commission of the State of New York,

Intervenors.

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Harold H. Young, Jr. for the petitioner in Nos. 7912 and 7962; Neal Powers, Jr. for the petitioners in Nos. 8115, 8118 and 8125; Joseph C. Johnson for the petitioner in No. 8116; Cecil E. Munn for the petitioner in No. 8119; Paul W. Hicks for the petitioners in No. 8122; Oliver L. Stone for the petitioner in No. 8123; and Herbert W.

VARNER for the petitioner in No. 8124. With them on the briefs were:

J. P. HAMMOND, WILLIAM P. HARDEMAN, CARROLL L. GILLIAM, PHILLIP R. EHRENKRANZ, and GROVE, JASKIEWICZ, GILLIAM & PUTBRESE for Pan American PETROLEUM CORPORATION, petitioner in Nos. 7912 and 7962;

CECIL N. COOK AND BUTLER, BINION, RICE, COOK & KNAPP for E. COCKRELL, JR., petitioner in No. 8115, FREEPORT SULPHUR COMPANY, petitioner in No. 8118, and U.S. OIL OF LOUISIANA INC., petitioner in No. 8125;

BRUCE R. MERRILL and THOMAS H. BURTON, JR., for CONTINENTAL OIL COMPANY, petitioner in No. 8116;

W. P. BARNES, JERE G. HAYES, and CANTEY, HANGER, GOOCH, CRAVENS & SCARBOROUGH for GENERAL AMERICAN OIL COMPANY OF TEXAS, petitioner in No. 8119;

H. H. HILLYER, JR. and H. H. HILLYER, III for J. RAY MCDERMOTT, INC., petitioner in No. 8121;

ROBERT W. HENDERSON for PLACID OIL COMPANY, MARGARET HUNT HILL, Trustee for HASSIE HUNT TRUST, H. L. HUNT and HUNT OIL COMPANY, petitioners in No. 8122;

THOMAS G. JOHNSON for SHELL OIL COMPANY, petitioner in No. 8123;

MURRAY CHRISTIAN for THE SUPERIOR OIL COMPANY, petitioner in No. 8124.

HOWARD E. WAHRENBROCK for the respondent. With him on the brief were RICHARD A. SOLOMON, General Counsel, CYRIL S. WOFSY, Attorney, and JOEL YOHALEM, Attorney, Federal Power Commission.

Before LEWIS, BREITENSTEIN and HILL, Circuit Judges.

LEWIS, Circuit Judge.

These petitions by independent natural gas producers seek review under section 19(b) of the Natural Gas Act [1] of orders entered by the Federal Power Commission establishing an "in-line" price and other conditions for permanent certificates of public convenience and necessity issued under section 7 of the Act and covering sales of gas in interstate commerce from producing areas in South Louisiana and the adjacent federal domain offshore.[2] Proceedings before the Commission encompassed some 362 separate certificate applications, two-thirds of which were settled and severed before the conclusion of hearings, for a wide variety of gas-sales contracts executed between 1945 and 1963.[3] By its orders the Commission set the "in-line" price, or maximum initial price, at 18.5 cents per Mcf, with an additional 1.5 cents per Mcf for tax reimbursement where the gas is produced within the taxing jurisdiction of Louisiana. Refunds were required, with interest, for amounts in excess of the in-line price previously collected under temporary certificates that contained express provisions for potential refund liability. All permanent certificates that issued were made subject to a moratorium on increased-rate filings above 23.55 cents per Mcf, including tax reimbursement, pending completion of the South Louisiana area rate proceeding or July 1, 1967, whichever is earlier. Finally, for those producers whose temporary certificates contained no refund conditions, the Commission reserved for further consideration the question of whether they would in fact be required to make refunds.

The petitions are before this court by virtue of the fact that Pan American Petroleum Corporation, petitioner in Nos. 7912 and 7962, has its principal place of business within the territorial bounds of this circuit and was the

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[1] 15 U.S.C. § 717r(b).

[2] Union Texas Petroleum *et al.*, Opinions Nos. 436 and 436-A, reported at 32 F.P.C. 254 and 32 F.P.C. 952.

[3] The petitions for review by four producers have been separately considered in this court. See Continental Oil Co. v. FPC, — F2 —, Feb. 10, 1967.

first producer to file for review. The other petitioners are transfers from other circuits. 28 U.S.C. § 2112(a). The four intervenors are parties of record, but upon their election not to file briefs we denied their requests to present oral arguments.

At the hearings below, several producers offered economic and geological evidence which purported to reflect an increase in production costs from those that had prevailed during prior South Louisiana certificate proceedings. The examiner rejected this evidence, the Commission sustained the examiner, and some of the petitioners here have filed motions to adduce. Action on the motions was deferred until completion of arguments on the merits of the orders. We have since held in Sunray DX Oil Co. v. FPC, — F2 —, Dec. 9, 1966,[4] that the standards of public convenience and necessity to be applied by the Commission in section 7 proceedings do not compel admission of such evidence. And while circumstances surrounding certificate applications may on occasion dictate consideration of cost factors, these are matters subject in the first instance to Commission expertise and discretion. *United Gas Improvement* v. *Callery Properties, Inc.*, 382 U.S. 223, 227. Here, as will be discussed, the Commission's orders are based partially upon comparisons between current prices and in-line prices previously established. Concededly, current economic and geological cost evidence could have a substantial effect upon final disposition of the applications. But for purposes of section 7, there is nothing in the record to suggest an abuse of Commission discretion in the rejection of such evidence, and accordingly, the motions to adduce will be denied. We turn then to the substantive content of the orders and the producers' various objections thereto.

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[4] References hereinafter to *Sunray DX* will be to the Dec. 9, 1966 decision of this court, — F2 —, unless otherwise noted.

THE IN-LINE PRICE

The origin of the in-line price concept is the landmark *CATCO* decision, Atlantic Ref. Co. v. Public Service Comm'n of New York, 360 U.S. 378, where the Supreme Court admonished the Commission to hold the line on natural gas prices pending determination of just and reasonable rates. Since *CATCO,* numerous court opinions have attempted to articulate and refine the evidentiary standards and methodology for in-line pricing. See, *e.g.,* United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223; Sunray DX Oil Co. v. FPC, 10 Cir., — F2 —, Dec. 9, 1966; California Oil Co., Western Div. v. FPC, 10 Cir., 315 F2 652; Public Service Comm'n of New York v. FPC, D.C. Cir., 329 F2 242, *cert. denied sub nom.*; Prado Oil & Gas Co. v. FPC, 377 U.S. 963; United Gas Improvement Co. v. FPC, 9 Cir., 283 F2 817, *cert. denied sub nom.*; Superior Oil Co. v. United Gas Improvement Co., 365 U.S. 879. From these and other authorities, two principles have emerged which more than once have presented the Commission with delicate problems of reconciliation. The first is that the price line must reflect current conditions in the industry and the prices on which the line is based must be those under which substantial quantities of gas presently move in interstate commerce. The second is that the Commission must be suspect of all current prices that are under review in pending court or Commission proceedings or that were arrived at by methods which subsequently have been disapproved in unrelated proceedings.

It was almost impossible for the Commission to adhere fully to both of these principles in the instant proceedings. Because of the substantial number of temporary certificates involved and the recent history of South Louisiana in-line price litigation, the majority of interstate gas volume from the area was moving under suspect prices. In a sense, current conditions in South Louisiana had to be treated as

suspect. Under the circumstances, therefore, the Commission looked to the 18.5-cent price line (exclusive of tax reimbursement) that had been established in three previous South Louisiana cases,[5] and adopted the view that, absent sufficient evidence showing the contrary, the old line would be presumed to have continued. All of the three previous decisions involved sales under contracts executed in the period 1956-1959. Absent the severed dockets, the instant case involves sales under contracts executed in the period 1957-1963.

One of the important factors that the Commission had to consider was whether the amendments to its Statement of General Policy No. 61-1, 24 F.P.C. 818, might have caused a general increase in permanently certificated prices for the South Louisiana area. The Statement established twenty-three geographic rate areas and proposed guideline prices for each area. When originally issued in September 1960, it did not set guidelines for South Louisiana because of pending litigation. On October 25, 1960, however, the Commission issued its First Amendment to the Statement, 24 F.P.C. 902, which fixed the South Louisiana guideline price at 21.5 cents per Mcf exclusive of tax reimbursement. Then on October 31, 1961, the Commission issued its Fourth Amendment to the Statement, 26 F.P.C. 661, which lowered the South Louisiana guideline price to 21.25 cents per Mcf, including tax reimbursement, and set a guideline of 19.5 cents per Mcf for gas produced in the adjacent federal domain offshore. In light of these amendments,

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[5] These were: United Gas Pipeline Co., 30 F.P.C. 329, *dismissed for lack of venue sub nom.* Gulf Oil Corp. v. FPC, 5 Cir., 330 F2 824; Placid Oil Co., 30 F.P.C. 283, *aff'd sub nom.* United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, *reversing* 5 Cir., 335 F2 1004; and Continental Oil Co., 27 F.P.C. 96 (*CATCO* on remand). None of these cases involved consolidation of dockets on a scale as great as the instant one.

the Commission tabulated all recent permanently certificated prices [6] according to four contract periods, *viz*:

(1) Prior to January 1, 1960, which was covered by the maximum price line (18.5 cents plus 1.5 cents for tax reimbursement where applicable) established in the three previous South Louisiana in-line cases (see note 5 *supra*);

(2) From January 1, 1960 to October 25, 1960, the date of the First Amendment to Statement of General Policy No. 61-1;

(3) From October 26, 1960 to October 31, 1961, the date of the Fourth Amendment to Statement of General Policy No. 61-1; and

(4) From November 1, 1961 to the end of 1962. The Commission then compared the weighted average permanent-certificate prices with the respective weighted average temporary-certificate prices in each contract period. The only temporary certificates considered were those involved in the instant proceeding. The findings and conclusions of the Commission may be summarized as follows:

For the calendar years in the first contract period, the weighted average price, including tax reimbursement, varied from 20.8814 cents to 21.8988 cents under permanent certificates and from 19.5573 cents to 22.2080 cents under applicable temporary certificates. Since these figures corresponded closely with the evidence on which the three prior in-line determinations were based, the Commission concluded that there was no reason to depart from the line that those cases had established.

For the second contract period, the weighted average price, including tax reimbursement, was 21.767 cents under permanent certificates and 22.76 cents under applicable temporary certificates. It was also found, however, that

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[6] Apparently all other price sources, including settlement agreements, were deemed suspect. The examiner characterized settlement agreements as being of "doubtful validity," but there was no elaboration on this point.

almost two-thirds of the permanently certificated volume for the period moved at 23.25 cents, a figure that was approved when the Commission was applying pricing standards in certificate cases which have since been disapproved by the courts. But rather than ignore altogether this unusually high price, the Commission simply observed that the weighted average price for permanently certificated sales was within the limits of the pre-1960 weighted average prices and concluded that the price line had not changed.[7]

For contracts falling in the period between issuance of the two guideline prices, the weighted average price, including tax reimbursement, was 17.148 cents under permanent certificates and 21.25 cents under applicable temporary certificates. Here, however, temporary volumes outweighed permanent volumes by almost four to one. For contracts dated after issuance of the second guideline price, or the fourth period, the weighted average price, including tax reimbursement, was 15.0194 cents under permanent certificates and 20.87 cents under temporary certificates. But here temporary volumes outweighed permanent volumes by more than nine to one and, in addition, the weighted average price for permanent certificates was quite distorted by an extremely low-priced sale at 10.75 cents. In view of the relatively few permanently certificated sales in these last two periods and the distortion caused by the one substantial low-priced sale, the Commission concluded that the marked decline in weighted average prices from those of the first two periods did not warrant a reduction of the previously established in-line price. Accordingly, the Commission ordered that for sales subject to the taxing jurisdiction of Louisiana, the price line would be held at 18.5 cents plus 1.5 cents for tax reimbursement.

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[7] If we ignore the sales at 23.25 cents, as the Commission could have done under the suspect-price doctrine, the weighted average price under permanent certificates for the second contract period would be 19.32 cents, including tax reimbursement.

No permanent certificates and only eight temporary certificates were issued for sales from the adjacent federal domain during the three periods subsequent to January 1, 1960. The weighted average prices under the temporary certificates were 21.5 cents for the second period and 19.5 cents for the third and fourth periods. The Commission concluded that these few sales were insufficient to show a change in the previous 18.5-cent price line for that offshore area.

Petitioners' threshold argument is that the findings and conclusions of the Commission are not supported by substantial evidence. To the contrary, we think the record shows commendable diligence in the presentation to the parties and to the court of the analytical approach, computation methods, and relevant data which led to the results reached. We further think that the conclusions relating to the 18.5-cent price line based upon the record findings are clearly reasonable.

Petitioners suggest that the price line has been subjectively pre-determined by reference to the three previous South Louisiana cases, and since some of the petitioners were not parties to those other proceedings, it is contended that they have been denied procedural due process. While such an argument has merit when considered in the abstract, it here does no more than beg the question. The Commission was careful to explain that although the previously established in-line price would be presumed to continue, it would be used simply as a point of departure in analyzing the more recent price evidence. In the end, it was demonstrated that, if anything, prices had declined rather than increased since the determination of the earlier price lines. The determination made here cannot be held invalid just because it is premised in part upon a comparison of current prices with earlier prices.

Petitioners next urge that the Commission erred in failing to give greater weight to the relatively large volumes of gas moving at prices in excess of 18.5 cents. In effect,

they accuse the Commission of having applied the suspect-price doctrine in such a manner that it became mathematically impossible not to freeze the results to old price lines that had no current relevancy. We note that in Placid Oil Co., 30 F.P.C. 283, *aff'd sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, *reversing* 5 Cir., 335 F2 1004, the Commission eliminated all sales in excess of 18.5 cents even though such sales, both numerically and volumetrically, represented well over half of the interstate total. The Supreme Court held that the 18.5-cent line was supported by the record. Here, in contrast to the *Callery* case, all permanently certificated sales, those above 18.5 cents as well as those below, were reflected in the Commission's computations. And although some of the computations were distorted by two permanent certificates at 23.25 cents and one permanent certificate at 10.75 cents, it is clear that neither the high-priced nor the low-priced sales were ignored or eliminated from consideration.

Petitioners also complain about the use of weighted averages to arrive at ceiling prices. Naturally, average prices are lower than the highest prices paid. As a matter of mathematical simplicity, however, there is nothing wrong with using weighted averages to compare one set of numbers with another. As we stated in the *Sunray DX* case, *supra*, a comparison of weighted average prices is proper so long as it is not arbitrary and capricious. We find nothing arbitrary or capricious about the procedure followed here. In *Sunray DX* the Commission concluded that the in-line price should be raised while here it concluded that it should remain unchanged. But different results cannot condemn the method used.

Petitioners' final contention aimed at the in-line price issue is that the guideline prices established by the First and Fourth Amendments to Statement of General Policy No. 61-1 should be presumed to represent in-line prices from the points of view of producers. Our position on this

question has already been set out in the *Sunray DX* opinion and a full restatement of that position here is unnecessary. Whatever reliance producers might have placed on the guideline prices, that reliance cannot be traced to any misleading statements by the Commission. Guideline prices are, and were here, issued *ex parte*, without opportunity for a hearing as required by section 7, and not subject to judicial review. *Wisconsin* v. *FPC*, D.C. Cir., 292 F2 753. It cannot be seriously contended that they represented equivalents to the in-line prices required by *CATCO* for the issuance of permanent certificates of public convenience and necessity. *Public Service Comm'n of New York* v. *FPC*, D.C. Cir., 329 F2 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963. We reiterate that having once established guideline prices the Commission could not totally ignore their effect on the in-line price. But here, as in *Sunray DX*, their effect was thoroughly evaluated.

In summation, we find that the Commission has approached the instant case with full appreciation for its importance to the producers as well as to the consumer. Aside from the deference we owe Commission expertise, *California* v. *FPC*, 9 Cir. 353 F2 16, 23, we are satisfied that the record evidence amply supports all of the substantive conclusions pertaining to the in-line price of 18.5 cents. We reach this conclusion, as we have indicated, in reliance upon the soundness of our earlier decision in *Sunray DX*. The District of Columbia Circuit has had recent occasion to refuse acceptance of some aspects of our reasoning in *Sunray DX*, although tacitly recognizing, as did we, that evidentiary standards must of necessity not be so inflexible as to frustrate the already-complex administration of the Natural Gas Act. *Public Service Comm'n of New York* v. *FPC*, D.C. Cir., F2 , Feb. 7, 1967. We do not believe that the simple purpose of a section 7 proceeding is to protect the consumer against exploitation pending determination of a just and reason-

able rate. But see *Public Service Comm'n of New York* v. *FPC, supra* at slip op. pp. 24-25. The general purpose of the Act is to protect the consumer, but section 7 proceedings, as well as other proceedings in the administration of the Act, must consider and attempt to obtain a balance between the interests of consumer, producer and all others whose interests fall between. The task is difficult, but experience has gradually attached more than lip-service significance to administrative expertise. Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices have made some adjustment in view of the inescapable captured market of regulation. The establishment of guidelines is a considered administrative function. Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interests. See generally *Continental Oil Co.* v. *FPC*, 10 Cir., F2 , Feb. 10, 1967; *Skelly Oil Co.* v. *FPC*, 10 Cir., F2 (*Permian Basin*), Jan. 20, 1967. We consider each of these procedural and background incidents to have proper evidentiary significance in a section 7 proceeding to be weighed by the Commission against the impact of more probative evidence such as permanent certificates in its determination of in-line prices. The rejection of economic and geological evidence, although not necessarily unrelated to current conditions, may be required for practical reasons. See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

Tax Reimbursement

Although we affirm the Commission's conclusions that the previously established 18.5-cent price line had not changed over the four contract periods, we find no support for the rather summary treatment of the 1.5-cent additional allowance for tax reimbursement where the gas is sold subject to the taxing jurisdiction of Louisiana. In *United Gas Improvement Co.* v. *FPC*, 9 Cir., 283 F2 817, 826,

cert. denied sub nom. Superior Oil Co. v. *United Gas Improvement Co.*, 365 U.S. 881, it was held:

> "[C]omparative tax reimbursement plans as well as comparative base rates ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion."

During most of the contract period covered by the three prior South Louisiana in-line cases, the State of Louisiana imposed a severance tax on natural gas production of 1.5 cents per Mcf. In August 1958, an additional "gathering" tax of one cent was added, but its collection was suspended on November 30 of the same year when the tax was challenged as unconstitutional.[8] In lieu thereof, on December 1, 1958, the severance tax was simply increased by one cent to 2.5 cents per Mcf. . See generally Pan American Petroleum Corp v. FPC, D.C. Cir., 322 F2 999. The reimbursement in the three prior cases was of course 1.5 cents, reflecting the full amount of the state severance tax being collected on the dates of most of the applicable contracts. The same tax reimbursement was given in the instant case without even acknowledging that there had been a change in the tax itself. Under the Ninth Circuit's *U.G.I.* decision, such action, unsupported by either evidence or logic, would indicate an abuse of discretion.[9]

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[8] It was ultimately held unconstitutional by the Supreme Court of Louisiana in Bel Oil Corp. v. Fontenot, 238 La. 1002, 117 So.2 571.

[9] In the brief and on oral argument, counsel for the Commission stated that the Supreme Court's *Callery* decision had disposed of the problem adversely to the producers. The *Callery* opinion, however, does not mention the propriety of the tax reimbursement, probably because the issue was not even before the Court when the case was originally submitted. The producers briefed the tax-reimbursement problem, along with several other issues, for the first time in their petition for rehearing. The petition was denied without opinion. 382 U.S. 1001.

Not knowing what the tax reimbursement might otherwise be, we are not in a position to determine whether the difference would be "relatively insubstantial." Petitioners have supplied the court with copies of an exhibit showing contract provisions for natural gas sales in South Louisiana from 1954 to 1962. They also refer to other evidence which, they contend, dictates a tax allowance of "at least 1.99¢ and in no event less than 1.8¢ per Mcf." From the collective points of view of the producers in the area, the differences could prove to be quite substantial. These portions of the record, however, have not been certified to us and included in the Joint Appendix, and in any event, it is the Commission that must first address itself to the problem.

The price conditions ordered by the examiner were:

> "(1) 18.5 cents per Mcf if the certificate relates to a sale not subject to the taxing jurisdiction of Louisiana, and (2) 20 cents per Mcf if the certificate relates to a sale subject to Louisiana tax."

And those ordered by the Commission were:

> "18.5 cents per Mcf at 15.025 psia, plus reimbursement for Louisiana severance tax, where applicable, of not more than 1.5 cents per Mcf."

Whether the Commission misconstrued the examiner's decision or was purposely emphasizing that the in-line price had not changed from that previously established, the difference between the methods of treatment is important. Both conclusions were based upon comparative contract prices which included tax reimbursement. The examiner ordered a 20-cent price *in*cluding tax reimbursement while the Commission ordered an 18.5-cent price *ex*cluding tax reimbursement. Obviously, if the unreimbursed severance tax paid by the producers is greater than 1.5 cents, their revenue will be below the Commission-determined base price of 18.5 cents. We find nothing in the record or in the arguments of counsel to justify a reduction of the tax reimbursement allowance below contract amounts. It appears that the pre-1958 contract allowances have been sum-

marily imposed on petitioners, and all history of changes in taxes and contract provisions have been ignored. We therefore remand this issue to the Commission for further consideration.

The Moratorium

Some of the petitioners object to the imposition of a moratorium on new rate filings in excess of 23.55 cents, including tax reimbursement, until final determination of the South Louisiana area rate or July 1, 1967, whichever is earlier. They contend that this condition in their permanent certificates has no support in the record to show that it is required by public convenience and necessity. This same contention was made about an identical moratorium provision in the *Callery* case, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223. The Supreme Court there held:

> "We think, contrary to the Court of Appeals, that there was ample power under § 7(e) for the Commission to attach these conditions for consumer protection during this interim period . . .
>
> "The 'in-line' price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not 'suspect,' and the selection of 23.55 cents beyond which a price increase might trigger escalation reflects the Commission's *expertise*." 382 U.S. at 228-29. (Emphasis by the Court.)

See also *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 42-43; *FPC* v. *Hunt*, 376 U.S. 515. The rationale of these authorities is equally applicable to the conditioning of certificates by Commission-approved take-or-pay provisions, provisions which require no separate consideration at this time. We therefore approve the Commission action on this aspect of the case.

Interest on Refunds

The Commission's orders require payment of refunds of amounts previously collected in excess of the in-line price [10] where temporary certificates were issued subject

to such refund liability. The orders require further that interest be paid at six percent per annum on excess amounts collected before March 1, 1960 and at seven percent per annum on excess amounts collected thereafter.[11] Those petitioners whose temporary certificates did not mention interest on refunds contend that there is neither an equitable basis nor legal authority for this portion of the orders. They insist that interest may commence running only from the date that their refund obligations became liquidated, and then only at a rate which is deemed compensatory. *Rodgers* v. *United States*, 332 U.S. 371; *Billings* v. *United States*, 232 U.S. 261. These arguments, however, ignore the prior case law as it specifically relates to FPC proceedings. In *Texaco, Inc.* v. *FPC*, 5 Cir., 290 F2 149, 157, and *Mississippi River Fuel Corp.* v. *FPC*, D.C. Cir., 281 F2 919, 927, *cert. denied* 365 U.S. 827, the courts approved orders imposing six percent interest on refunds even though the sellers had no express notice that interest might be required. And in *Callery, supra*, where a seven percent rate was imposed without notice, the Supreme Court stated simply that "the imposition of interest on refunds is not an inappropriate means of preventing unjust enrichment." 382 U.S. at 230.[12] Here, too, we approve the action taken by the Commission.

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[10] Or in excess of the price floor fixed in certain temporary certificates if the floor is higher than the in-line price.

[11] March 1, 1960 is the date of issuance of Order No. 215A, 23 F.P.C. 474, where interest payable on refunds as increased from six to seven percent.

[12] Petitioners suggest that they are being discriminated against because in five other recent opinions the Commission set the rate at only 4½ percent. The Commission explains that all of those cases involved situations where, once the amount to be refunded became liquidated, the producers were given the option of holding the fund or depositing it in an escrow account where it would be invested in short-term government obligations, both pending an order of distribution.

REFUNDS UNDER UNCONDITIONED TEMPORARY CERTIFICATES

As in our *Sunray DX* case, petitioners vigorously object to the portion of the Commission's orders that defers for further consideration the questions of whether and to what extent refunds will be required where temporary certificates were issued without express refund conditions. And while, unlike *Sunray DX*, we are not aware of any recent Commission action directing petitioners with unconditioned temporary certificates to make refunds out of the subject sales, we are nevertheless convinced that there is sufficient aggrievement for review at this time. On the authority of the *Skelly* case, *Public Service Comm'n of New York* v. *FPC*, D.C. Cir., 329 F2 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963, the Commission has ruled that it has "both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price" even where temporary authorizations are silent as to potential refund liability. Skelly Oil Co., *et al.*, Opinion No. 492, June 1, 1966.[13] Many producers, in reliance upon prior assurances that all of the moneys collected under such authorizations was theirs to keep,[14] have spent

[13] See also Sun Oil Co., *et al.*, Opinion No. 502, July 28, 1966; Amerada Petroleum Corp., *et al.*, Opinion No. 501, July 27, 1966; Turnbull & Zoch Drilling Co., *et al.*, Opinion No. 499, July 25, 1966; H. L. Hawkins, *et al.*, Opinion No. 498, July 22, 1966.

[14] See FPC Chairman Swidler's published address to the 1961 annual meeting of the American Petroleum Institute. See also 29 F.P.C. 223, 225, where in denying intervenors' motions to impose refund conditions on previously issued unconditioned temporary certificates, a unanimous Commission stated:

> "[W]e would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon (the producer's) part'. *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F2 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy."

or reinvested the proceeds from their sales and would be hard put to find now the substantial amounts necessary for refunds. Inasmuch as the Commission's position on the merits of the issue is firmly established, albeit in opinions not related to this case, the threat of loss to these petitioners is real and imminent, and judicial consideration of their liability need not be postponed. *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 417-21; *Sunray DX Oil Co.* v. *FPC,* 10 Cir., 351 F2 395, 400; *Hinton* v. *Udall,* D.C. Cir., 364 F2 676, 680.

We held in *Sunray DX* that "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition." [15] We adhere to that decision for purposes of this case and see no reason for duplication here of principles and views already discussed. We shall, however, consider one contention that has been made by the Commission and not covered in the *Sunray DX* opinion. It is that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the District of Columbia Circuit's *Skelly* decision. From then on, says the Commission, "a producer should have taken steps to protect himself in the event refunds were ordered, and if he failed to do so, he has no equity to plead which will affect his refund obligation." [16] Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certifi-

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[15] — F2 at —. The rule would not apply of course where an unconditioned temporary certificate has not become final and is overturned by a reviewing court. United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 229.

[16] H. L. Hawkins, *et al.*, Opinion No. 498, p. 3, July 22, 1966.

cates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that "it is entirely possible . . . that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate." It is difficult to imagine how a case in this posture could have dictated immediate preparation for a turning away from years of Commission assurances [17] and from what was believed to be settled judicial interpretation.[18]

Both the Commission and the courts have repeatedly acknowledged that stability of prices is one of the great objectives of regulation under the Natural Gas Act. We have been especially mindful of this objective in our consideration of the moratoria on new rate filings and other restrictive conditions in the producers' licenses to sell gas in interstate commerce. It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created. The Commission has stated that "temporary authorizations are not and could never be a vehicle for assuring such [price] stability by the very method by which they are handled." Skelly Oil Co., *et al.*, Opinion 492, p. 4, June 1, 1966. We emphatically disagree. The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we

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[17] See note 14 *supra*.

[18] Sunray Mid-Continent Oil Co. v. FPC, 10 Cir., 270 F2 404, 408-10; *cf.* FPC v. Hope Natural Gas Co., 320 U.S. 591, 618.

consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case.

The motions to adduce additional evidence are denied. All cases are remanded to the Commission for further proceedings consistent with this opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1374~~ 143

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and LONG ISLAND LIGHTING COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

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No.

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and LONG ISLAND LIGHTING COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Nos. 19,796, 19,800, and 19,919 on February 7, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in Nos. 19,796, 19,800 and 19,919 is not yet reported; it is printed in Appendix B hereto, *infra,* pp. 3a-35a. The Court's

opinion relates to two opinions of the Federal Power Commission (Commission) each of which, in turn, relates to a large number of producer applications under Section 7 of the Natural Gas Act for certificates of public convenience and necessity which were consolidated for purposes of hearing and decision. The Opinion of the Commission under review in No. 19,796 (Opinion No. 475, the *Hawkins* case) is printed in the Joint Appendix below at H.R. 7292-7317 and is reported at 34 FPC 897 (1965).[1] The Commission's order on rehearing in that case (Opinion No. 475-A) is printed in the Joint Appendix below at H.R. 7505-7508 and is reported at 34 FPC 1330 (1965). The Commission's Opinion under review in Nos. 19,800 and 19,919 (Opinion No. 476, the *Sinclair* case) is printed in the Joint Appendix below at S.R. 4172-4193 and is reported at 34 FPC 930 (1965). The Commission's order on rehearing in that case (Opinion No. 476-A) is printed in the Joint Appendix below at S.R. 4283-4287 and is reported at 34 FPC 1357 (1965).

JURISDICTION

The opinion of the Court of Appeals in Nos. 19,796, 19,800, and 19,919 was filed on February 7, 1967. Jurisdiction of this Court over the judgment is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b) (1958).

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[1] Separate Joint Appendices were filed in the proceedings below. The record contained in the Joint Appendix in the *Hawkins* case, No. 19,796, will be designated herein as "H.R. ——"; the record contained in the Joint Appendix in the *Sinclair* case, Nos. 19,800 and 19,919, will be designated herein as "S.R. ——".

QUESTIONS PRESENTED

A prime determinant in issuing a certificate of public convenience and necessity to an independent producer pursuant to Section 7 of the Natural Gas Act is the establishment of an in-line price at which the sale may be made. *Atlantic Refining Co.* v. *P.S.C. of State of New York,* 360 U.S. 378, 391-392 (1959); *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 226-228 (1965).

One question presented in this case is whether the Commission, in establishing the several in-line prices for the sales involved, is obligated to disregard current conditions in the areas which might affect the price levels, including prices being collected pursuant to temporary certificates, contract prices, and its own price guidelines.

The Court below also held that the Commission is required in producer certificate proceedings to determine whether consumers which are customers of pipelines purchasing from producers, or even customers of such customers, will use the gas in an "economically inferior way." The second question presented is whether producer applicants or the Commission are required to show that the gas to be sold will not eventually be used by some consumer in an "economically inferior way."

STATUTE INVOLVED

The statutory provisions involved are Sections 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 825 (1938), 56 Stat. 84 (1942), 15 U.S.C. §§ 717f(c) and (e). These sections are printed in Appendix A hereto, *infra,* pp. 1a-2a.

STATEMENT

These proceedings arose upon applications pursuant to Section 7 of the Natural Gas Act filed by independent producers seeking certificates of public convenience and necessity authorizing sales to interstate pipeline companies. Case No. 19,796 relates to producer sales in Texas Railroad District No. 3 (the *Hawkins* case).[2] Case Nos. 19,800 and 19,919 relate to producer sales in Texas Railroad District No. 2 (the *Sinclair* case).[3]

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[2] No. 19,796 involves review sought by the Public Service Commission of the State of New York of the Commission's Opinion No. 475 in which the Commission granted 36 applications for certificates which had been consolidated for purposes of hearing and decision in Hawkins & Hawkins, *et al.*, Docket Nos. G-18077, *et al.*

[3] No. 19,800 involves review sought by the Public Service Commission of the State of New York of the Commission's Opinion No. 476 in which the Commission granted 41 applications for certificates which had been consolidated for purposes of hearing and decision in Sinclair Oil & Gas Co., *et al.*, Docket Nos. G-16760, *et al.* No. 19,919 also involves review of Opinion No. 476 on petition filed by Long Island Lighting Company.

In its Statement of General Policy No. 61-1, issued September 28, 1960 (24 FPC 818), the Commission established 24 pricing areas for the sales of natural gas by independent producers. Texas Railroad District Nos. 2 and 3 were among the pricing areas so established. In the orders consolidating producer applications for hearing and decision, the Commission simply consolidated pending producer applications in each of the two Railroad Districts. Similar consolidated proceedings have been held with respect to other pricing areas. See, *e.g.*, Union Texas Petroleum, Inc., *et al.*, Docket Nos. G-13221, *et al.*, Opinion No. 436, 32 FPC 254 (1964) [the South Louisiana Area], aff'd in part and rev'd in part, *sub nom.*, Pan American Petroleum Corporation v. F.P.C., — F. 2d —, Nos. 7912, *et al.* (10th Cir. decided March 9, 1967), Amerada Petroleum Corp., *et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422, 31 FPC 623 (1964) [Texas Railroad District No. 4], aff'd in part and rev'd in part, *sub nom.* Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966).

The Court below wrote a single opinion covering all three cases.[4]

In determining the appropriate price levels at which the permanent certificates in both areas should issue, the Commission applied the "in-line price" test initiated in *Atlantic Refining Co.* v. *Public Service Commission of State of New York,* 360 U.S. 378 (1959) and approved in many court proceedings, including review by this Court in *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965). For Railroad District 3 (*Hawkins*) it derived two "in-line" price levels, one at 16.0 cents per Mcf for contracts executed during a period from January 1, 1958 to September 28, 1960, and the other at 17.0 cents per Mcf for contracts executed from September 28, 1960 to January 1, 1964. For Railroad District No. 2 (*Sinclair*) the Commission also divided the consolidated proceedings into two time periods in deriving the applicable in-line price levels. From January 1, 1957 to September 28, 1960, the in-line price was fixed at 15.0 cents per Mcf. For the period subsequent to September 28, 1960, to a cut-off date of March 10, 1964, the Commission fixed the in-line price at 16.0 cents per Mcf. Based upon these determinations, the Commission certificated sales in Railroad District Nos. 2 and 3 at prices not to exceed the applicable "in-line" price levels.

In each instance, the Commission made its determination based upon an analysis of prices at which substantial amounts of gas were flowing in interstate com-

[4] The opinion of the Court below also related to Nos. 19,941 and 19,957 which were petitions for review filed by Continental Oil Company and The Superior Oil Company, respectively.

merce during the time period involved. For example, in *Sinclair* it held (S.R. 4175):

> "The Examiner correctly observed that the beginning point in any in-line price decision is *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959) (CATCO), in which the Court stressed the importance of the Commission's responsibilities to scrutinize the level of initial prices for new sales by producers to assure that they do not establish higher pricing levels in the area without explanation. Following that decision, we enunciated definitive standards for exercising our responsibilities in a series of opinions beginning with *Skelly Oil Company,* Opinion No. 362, 28 FPC 401 (1962), and *Texaco Seaboard, Inc.,* Opinion No. 383, 29 FPC 593 (1963), and continuing through *Union Texas Petroleum Company,* Opinion No. 436, 32 FPC 254 (1964). Generally, we have held that the line to which initial producer prices must be related is the level at which substantial volumes of gas, not under judicial review, or otherwise suspect, move in interstate commerce during the time period under consideration. Where the substantial volumes of gas so moving have been under permanent certificates, we have relied principally upon the initial prices of natural gas sold under such permanent certificates in determining the in-line price. *Skelly Oil Company, supra, Texaco Seaboard, Inc., supra.* On the other hand, where the volumes of gas moving under permanent certificates were relatively insubstantial or failed adequately to reflect current conditions in the industry, we have given consideration to the initial prices of substantial volumes of natural gas sold under temporary certificates. *Amerada Petroleum Corporation,* Opinion No. 422, 31 FPC 623 (1964); *Union Texas Petroleum Company, supra.*"

The Commission's analysis included consideration of prices under permanently certificated sales but ex-

cluded certain sales which were not comparable with the sales for which certificates were sought (H.R. 7294, 34 FPC 900-901; S.R. 4179, 34 FPC 936) and compared quality specifications of the subject sales with previously certificated sales (H.R. 7295, 34 FPC 901). Consistent with past practice, the Commission attributed some weight, although not primary consideration, to contract prices since they show economic trends in the area (H.R. 7295, 34 FPC 902; S.R. 4180, 34 FPC 937). Likewise, it gave some weight to prices authorized under temporary certificates (H. R. 7295-7296, 34 FPC 902-903; S.R. 4179-4180, 34 FPC 936).

The Commission also directed its attention to a contention by the Public Service Commission of the State of New York (NYPSC) that the producers should have shown a public need for the gas before the certificates could be issued. In this connection, the fact is that the pipeline purchasers had been buying the gas from the producers for a number of years pursuant to temporary certificates. Nonetheless, NYPSC contended without any evidentiary showing that the pipelines or their customers did not need this particular gas since some of the pipelines were paying for gas not currently taken. The Commission recognized that, in order to maintain substantial reserves, pipelines are required to contract for supplies even though current deliveries cannot be scheduled to correspond precisely with the payments required under the take-or-pay contract provisions. The Commission concluded (H.R. 7293, 34 FPC 900):

> "[I]t is to be expected that such companies [pipeline purchasers] will occasionally have long-term contractors [sic] for supplies which will give them gas for the future, even though the supplies may be slightly in excess of their present-day needs.

The issue of public need should be confined to pipeline certificates, not producer applications."

After denial of rehearing, petitions for review were filed by NYPSC and Long Island Lighting Company (LILCo) in the Court of Appeals for the District of Columbia Circuit. These petitions sought reversal of the Commission's opinions, arguing that the in-line prices were too high and that there was no public need for the gas.

THE OPINION OF THE COURT BELOW

By order issued March 7, 1966, the Court of Appeals for the District of Columbia Circuit consolidated the several proceedings for review. It had granted intervention of these petitioners by orders issued on January 4 and January 26, 1966, in No. 19,796; by order issued on January 5, 1966, in No. 19,800; and by order issued on March 14, 1966, in No. 19,919. In an opinion issued February 7, 1967, the Court set aside the Commission's opinions and orders and remanded the cases for further proceedings.

In reaching its conclusion the Court held that the Commission had not properly derived the in-line prices for the two areas. Specifically, the Court held the Commission's array of prices from which the in-line prices were derived should not have included contract prices or prices being collected under temporary certificates. According to the Court, the in-line price which forms the basis upon which sales are to be certificated should be established by reference only to permanently certificated prices which are not subject to review. By this holding, the Court would necessarily eliminate from Commission consideration a vital element, current conditions under which sales are made,

and would force a roll-back of prices to levels having no current relevancy.

In rejecting the current conditions test, the Court held that the Commission's guideline price levels which have been established for the several pricing areas throughout the country, pursuant to the Commission's Statement of General Policy No. 61-1, as amended,[5] should not be given any weight in determining the in-line price. Yet the Court recognized that the guideline price levels were fixed for the purpose of guidance and initial action by the Commission (App. B, pp. 20a-21a).

The Court also held that prices under temporary certificates could not be used because they are "suspect" in the sense that the prices charged may be subject to change at some later date (App. B, p. 23a).

Finally, the Court concluded that when permanently certificated sales are available for reference an in-line price "should not depend upon current conditions." (App. B, p. 26a). The obvious result of the Court's limitation on the in-line price test would be to require a price freeze which may, in fact, be at a level below the just and reasonable rate later fixed in an Area Rate proceeding.[6]

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[5] 24 FPC 819 (1960).

[6] For example, the Commission's certificate price level in the Permian Basin prior to its Area Rate Opinion in Docket Nos. AR61-1, *et al.* (the first area rate case) was 16.0 cents per Mcf, which is 0.5 cents per Mcf below the just and reasonable rate of 16.5 cents per Mcf fixed for new gas. It is also noteworthy that in the Texas Gulf Coast Area Rate Proceeding, Docket Nos. AR64-2, *et al.*, which includes the areas involved in these proceedings, the Commission's Staff is recommending rates for new gas of 16.4 cents per Mcf for gas without gathering and 16.8 cents per Mcf with gathering. If in-line prices should be fixed below the just and reasonable rate level, producers would have no recourse and would not be able to recoup the just and reasonable rate for the past period.

The Court also held that the Commission's Opinions were deficient because of the lack of consideration of public need for the gas. The Court concluded that the Commission should consider not only market demand for the gas but also conservation and prevention of waste. The Court suggested that the Commission should weigh the comparative needs of pipelines and their customers and should not issue a producer certificate if the pipeline plans to resell the gas to a consumer who will use the gas in an "economically inferior way." (App. B, pp. 24a-26a).

REASONS FOR GRANTING THE WRIT

The decision of the Court below presents questions of substantial importance in the administration of the Natural Gas Act. One concerns mechanics for determining in-line price. Here, the opinion below is in conflict[7] with decisions of other Courts of Appeals and

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[7] We note the assertion in the opinion below that the opinion of the Tenth Circuit in Sunray DX Oil Company v. FPC, 370 F. 2d 181 (10th Cir. 1966) involved "a problem very different from ours." But the relevant facts in *Sunray* were similar to those in the *Sinclair* case (see S.R. 4179). This cannot be said as to *Hawkins* (see H.R. 7296). But the comparison of whatever the facts to one side, the thrust of the opinions of the two courts collide in the materially different rules which they applied.

While it is the view of Petitioner, Humble Oil & Refining Company, that, based upon a comparative analysis of the facts, the results reached by the Court below and the Tenth Circuit are reconcilable, it nevertheless urges a review of the opinion below because of the importance of the questions presented and erroneously decided by the District of Columbia Circuit.

even with its own prior decisions.[8] The other question concerns the necessity to show a "public need" for the gas proposed to be sold.[9]

1. The Lower Court's Refusal To Permit the Commission To Consider Prices Under Temporary Certificates and Other Indicia of Current Conditions When Fixing an In-Line Price Presents an Important Question as to the Manner in Which Producer Sales Shall Be Certificated Which Conflicts With the Rule of Law Established by This Court, as Amplified by Various Courts of Appeals.

In the opinion below the Court held that determination of an in-line price is not dependent upon current conditions. According to the lower court, an in-line price should be frozen pending outcome of rate proceedings under Sections 4 and 5 of the Natural Gas Act (App. B, p. 26a). These concepts, if approved, would have a vital effect upon the Commission's in-line price determinations and severely limit the Commission certification procedures under Section 7 of

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[8] See Atlantic Refining Co. v. P.S.C. of N.Y., 360 U.S. 378 (1959); United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965); Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966); Pan American Petroleum Corp. v. F.P.C., — F. 2d — (Nos. 7912, *et al.*, 10th Cir., decided March 9, 1967); United Gas Improvement Co. v. F.P.C., 283 F. 2d 817 (9th Cir. 1960); P.S.C. of New York v. F.P.C., 329 F. 2d 242, *cert. den.* on other grounds, *sub nom.* Prado Oil & Gas Co. v. F.P.C., 377 U.S. 963 (1964); Atlantic Refining Co. v. F.P.C., 316 F. 2d 677 (D.C. Cir. 1963).

[9] The *Sunray* decision expressly denied Commission power to order refunds. Since this issue was not dealt with in the opinion of the Court below, it will not be discussed here. Petitioners deny that the Commission has power to order refunds of amounts collected pursuant to unconditioned temporary certificates and reserve their right to support that position if the issue is subsequently briefed and argued in this Court.

the Natural Gas Act. They would effectively prohibit the Commission from testing proposed prices against a price line which represents current conditions in the area during the relevant time period. Since Commission certification of producer sales not only governs the price at which gas is permitted to enter the interstate market, but also establishes the terms upon which gas is to be sold over a considerable period of time pending determination of a just and reasonable rate in area rate proceedings, the impact of a price freeze or roll-back cannot be overemphasized.[10]

Furthermore, exclusion of evidence of current conditions as represented by prices under temporary certificates, contract prices, and guideline rates would result in an abdication of Commission responsibility and would permit parties with an adverse interest to determine the in-line price. For, if the Commission consideration were limited to permanently certificated sales which are not subject to any review, any utility customer of a pipeline could control the prices which the Commission could consider, and thereby effectively fix the price line. The adverse party could determine the in-line price merely by contesting all prices above a level of its own choosing. As the Commission itself

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[10] The Court below recognized that the in-line price will be effective for an "interim period between sales of gas and the rate determination under § 4 or § 5 of the Act." But the lower court failed to note that the "interim period" may last a decade or more. Notably, since producer regulation was undertaken in 1954, there has been no area rate determination for Texas Railroad Districts 2 and 3. The area rate case involving those districts in Docket Nos. AR64-2, *et al.*, was begun in 1963, but the presiding examiner's decision has not yet issued.

held in its Opinion No. 422 involving its determination of an in-line price in Texas Railroad District No. 4:[11]

> "It is not by chance that . . . the only permanent certificates granted during the period were at prices of 15 cents per Mcf or lower, because all applications for higher prices were opposed by some or all of the interveners herein. If these permanent certificates are to control, then the 'in-line' price for sales representing over seven times the minimal volumes of gas permanently certificated during this period is being determined, not upon consideration of a hearing record, but by the unreviewable fiat of the interveners."

Moreover, the opinion below constitutes an abrupt departure from the in-line price concept first announced by this Court in the *CATCO* case.[12] In that case, this Court reversed a Commission order granting certificates at the contract price because it appeared that the price was out-of-line and might "trigger" increases in other prices in the area (360 U.S. at 391-392). Notably, there was nothing in *CATCO* which required, or even suggested, that all certificate prices should be frozen at, or rolled back to, some pre-existing level pending the outcome of just and reasonable rate proceedings under Sections 4 or 5 of the Natural Gas Act.

Numerous decisions by many Courts of Appeals have successively reviewed Commission's application of the CATCO formula, commonly known as the in-line price test. As noted above the Commission suc-

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[11] Amerada Petroleum Corp., *et al.*, Opinion No. 422, 31 FPC 623, 632 (1964), aff'd in pertinent part, *sub nom.* Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966).

[12] Atlantic Refining Co. v. P.S.C. of N.Y., 360 U.S. 378 (1959).

cinctly stated the in-line price test to be a comparison of proposed prices with the price level at which substantial volumes of gas, not under judicial review or otherwise suspect, flow in interstate commerce during the time period under consideration. Where permanently certificated prices fail to reflect current conditions, consideration is also given to sales under temporary certificates (H.R. 7295-7296; S.R. 4179).

The Court of Appeals for the Tenth Circuit has recently reaffirmed Commission reference to current conditions under which gas is sold, including prices under temporary certificates and the effect of the Commission's guideline prices established in its Statement of General Policy No. 61-1, as amended. Thus, in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F. 2d 181, 186-187 (1966), the Court of Appeals for the Tenth Circuit held that the Commission is obligated to evaluate the effect of its guideline prices upon the price line. Contrast the opinion below which held that the guideline prices should be given no consideration (App. B, pp. 20a-21a).

The Tenth Circuit also expressly rejected a contention that a price line, once established, does not change until determination of a just and reasonable rate (370 F. 2d 187). A price line, that Court held, must reflect current conditions, noting (370 F. 2d 187-188):

> "The Commission has recognized that the in-line price must reflect current conditions. The Courts of Appeals have agreed. Further support is found in the Callery decision where the Supreme Court referred to 'other contemporaneous certificates' and 'prices higher than existing levels.' We concur with the Commission that once the in-line price is established it is presumed to continue not

> until the just and reasonable rate is determined but until 'substantial evidence is presented that it has changed.'" (Footnotes omitted.)

The Court below, on the other hand, declared (App. B, p. 26a):

> "We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act."

Notably, the interim period referred to by the Court below can hardly be characterized as "temporary" since, in the thirteen year history of producer regulation, the Commission has never determined the just and reasonable rate in the Texas Gulf Coast Area.

Most importantly, the Tenth Circuit held that reference to prices under temporary certificates is justified in order to determine current price conditions (370 F. 2d 189). Of course, the Tenth Circuit recognized that the weight to be accorded to prices under temporary certificates will vary depending upon the circumstances in each case. Thus, it noted that in the *Skelly* case the Court of Appeals for the District of Columbia Circuit had affirmed a Commission opinion which held that temporary certificates were "not as persuasive" as permanent certificate prices (370 F. 2d 190).

Although the Court below suggested that prices under temporary certificates might be utilized in fixing a price line if no permanently certificated prices were available for reference, it flatly rejected consideration of such prices if permanently certificated prices are

available. In contrast, the Tenth Circuit's *Sunray* opinion declared that prices under temporary certificates constitute important indicia of the price line even when permanently certificated prices are available. The rule of law asserted by the Court below, unlike *Sunray* and opinions in other Circuits, drastically limits and modifies the in-line price concept.

Certainly, prices under temporary certificates are not to be rejected as "suspect." In *Sunray,* the Court noted with approval that, in determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. Since an in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce, the Tenth Circuit reasoned, use of prices under temporary certificates cannot be denied on the grounds that they are "suspect." But the opinion below requires that no consideration be given to prices under temporary certificates, on the theory that such prices are "suspect."

We submit that the rationale of the opinion below that current conditions should be ignored in determining an in-line price is irreconcilable with the rationale of *Sunray* which holds that current conditions cannot be ignored.

The opinion below is also in conflict with the opinion of the Court of Appeals for the Tenth Circuit in *Pan American Petroleum Corp.* v. *F.P.C.,* Nos. 7912, *et al.,* decided March 9, 1967, where the Court held (Slip Opinion, p. 15):

> "Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices

> have made some adjustment in view of the inescapable captured market of regulation. The establishment of guidelines is a considered administrative function. Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interests. * * * We consider each of these procedural and background incidents to have proper evidentiary significance in a section 7 proceeding to be weighed by the Commission against the impact of more probative evidence such as permanent certificates in its determination of in-line prices."

The opinion below also departs from other opinions of the same Court. Thus, it has described the in-line price test to mean the determination of a price line "at which similar sales, not suspect, were made under similar circumstances from the same area about the same time." [18]

In the same case, the Court approved Commission use of contract prices and prices collected under *temporary certificates* when it affirmed the in-line price determinations. The Commission had carefully attempted to reflect current conditions by dividing a 17-month time span into two periods and determining a separate in-line price for each period. The Commission had held (27 FPC 551 at 553):

> "As a guide in determining whether each applicant's 18.5 cent price is 'out of line,' as that phrase is used in the CATCO decision, the staff exhibit shows that during the period from June 1958 to October 1959, in which the 14 contracts involved herein were signed, 44 other contracts were made

[18] Atlantic Refining Co. v. F.P.C., 316 F. 2d 677, 680 (1963).

for jurisdictional sales in North Louisiana at prices ranging from 12.5 cents to 18.5 cents per Mcf. Of the 29 sales made during the first eleven months of this period, 21 were priced at 16.5 cents, and 12 of these have been permanently certificated. Of the 15 sales made during the last six months, 8 were priced at 17.0 cents, and 2 of these have been permanently certificated. In 1958 three non-jurisdictional sales from the area were negotiated at prices from 18 to 19.5 cents; but from 1957 through 1960 only one jurisdictional sale has been permanently certificated at 18.5 cents. Assuming that the objections to considering this last sale are without merit, it is nevertheless apparent that the 'in-line' price in North Louisiana was 16.5 cents until May, 1959; and thereafter, it was 17.0 cents." (Footnotes omitted.)

Note that the increase of the in-line price from 16.5 cents per Mcf to 17.0 cents per Mcf reflected current conditions including prices under temporary certificates and necessarily rejected the concept of a price freeze inherent in the opinion below.

The opinion below also conflicts with its own opinion in *P.S.C. of New York* v. *F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964) where it upheld the Commission's determination of an in-line price based in part upon prices allowed under temporary certificates (329 F. 2d at 246). In that case,[14] as in the cases here under review, the Commission attributed less weight to the prices under temporary certificates than to permanently certificated prices (H.R. 7295-7296). But some consider-

[14] P.S.C. of New York v. F.P.C., 329 F. 2d 242 (D.C. Cir. 1964), is commonly known as the *Skelly* case because Skelly Oil Company's docket was the lead docket in the consolidated proceedings before the Commission.

ation of prices under temporary certificates was obviously necessary if the in-line price test were not to be converted into a price freeze or roll-back and certificate proceedings to be rendered meaningless (H.R. 7296).

The opinion below conflicts with the *Skelly* case in another significant respect. The producers argued in *Skelly* that the 15 cent in-line price for the 1958-1960 period was too low because the Commission should have considered 16 and 17 cent permanently certificated prices executed during 1956 and 1957. The Court affirmed the Commission's refusal to consider prices during the earlier period, holding that such sales "did not establish a valid line of 16 to 17 cents for the area during the 1958 to 1960 period," thus disavowing any price freeze or roll-back concept. It may be noted that, if the lower court's present position as evidenced by the opinion below had prevailed, the Commission would have been required to give weight to the 16-17 cent prices. Of course, in that case, the refusal to consider current conditions would have resulted in a higher price line.

The opinion below is unique. It is also wrong. It is the only court opinion which holds that the Commission, in determining the present and future public convenience and necessity, must blind itself to current conditions and thereby to freeze or roll back prices at levels which have no current relevancy. Contrast *United Gas Improvement Co.* v. *F.P.C.*, where the Ninth Circuit Court held [283 F. 2d 817, 824 (9th Cir. 1960)]:

> "As previously indicated, the price line is intended to reflect current conditions in the industry.

Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in fact, require a rollback to prices having no current relevancy."

2. The Lower Court's Holding That a Producer Applicant Must Show That Consumers Will Not Use His Gas in an Economically Inferior Way Presents a Question of Primary Importance in Administration of the Natural Gas Act.

In addition to the conflict with the opinions of this Court and the Courts of Appeals in other Circuits, the opinion below presents a question of exceptional importance in administration of the Natural Gas Act. NYPSC contended that producers are required to show need for the gas before their sales can be permanently certificated. In upholding NYPSC's contention the Court below went far beyond the issue raised. NYPSC had argued in the narrow sense that the pipeline purchasers might not need the gas because they might be forced, pursuant to their gas purchase contracts, to pay for gas before deliveries could be scheduled. Yet the Court below held that the Commission must not only consider the effect of new purchases upon a pipeline's take-or-pay-for position, but also declared that the Commission, when processing a producer's application, must determine whether the pipeline purchaser or its customers, which are unknown to the producer, will use the gas in an "economically 'inferior' way." Accord-

ing to the Court below, the Commission "must consider *all* alternative uses." (App. B, p. 10a). Under the lower court's rationale, either the Commission or an independent producer, such as Mrs. Dougherty, must show, before she is entitled to a certificate covering her contract with Natural Gas Pipeline Company of America, that her gas could not be more economically used by customers of some other pipeline.

In final analysis, the Court's opinion below would require expansion of the Commission's powers in a manner not susceptible of rational administration. It would either impose upon producer applicants an impossible burden or make them entirely dependent for proof of public convenience and necessity upon the Commission's discretion as to what evidence it would develop to support the applicants' case.

CONCLUSION

The opinion below raises important questions in administration of Section 7 of the Natural Gas Act and conflicts with opinions of this Court and other Courts of Appeals, particularly the opinion of the Tenth Circuit in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F. 2d 181 (1966). Such questions require resolution by this Court. Likewise, the issue raised by the breadth of the lower court's holding as to the duty of producer applicants and the Commission in establishing a public need for gas in producer certificate cases is of tran-

scendent public importance which should be reviewed by this Court.

Respectfully submitted,

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APPENDIX A

SEC. 7(c)

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accord-

ingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)]

SEC. 7(e)

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

SKELLY OIL COMPANY,
SUN OIL COMPANY,
CALLERY PROPERTIES, INC.,
SHELL OIL COMPANY,
PAN AMERICAN PETROLEUM CORPORATION,
SUPERIOR OIL COMPANY,
HUMBLE OIL & REFINING COMPANY,
W. S. KILROY, et al., and KILROY PROPERTIES, INC.,
H. L. HAWKINS & H. L. HAWKINS, JR.,
PLACID OIL COMPANY, et al.,
INTERVENORS

No. 19,800

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

MONSANTO COMPANY,
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD, et al.,
EDWIN M. JONES OIL COMPANY,
SHELL OIL COMPANY,
H. D. BRUNS & MPS PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY,
LAMAR HUNT,
INTERVENORS

No. 19,919

LONG ISLAND LIGHTING COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

LAMAR HUNT,
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD, et al.,
EDWIN M. JONES OIL COMPANY,
INTERVENORS

No. 19,941

CONTINENTAL OIL COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 19,957

THE SUPERIOR OIL COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petitions to Review Orders of the
Federal Power Commission

Decided February 7, 1967

Mr. Morton L. Simons, with whom *Mr. Kent H. Brown* was on the brief, for petitioner in Nos. 19796 and 19800.

Mr. Joseph C. Johnson, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom

Messrs. Bruce R. Merrill and *Thomas H. Burton* were on the brief, for petitioner in No. 19941.

Mr. Homer J. Penn for petitioner in No. 19957. *Messrs. Herbert W. Varner* and *William T. Kilbourne, II,* were on the brief for petitioner in No. 19957.

Mr. Joel Yohalem, Attorney, Federal Power Commission, with whom *Messrs. Richard A. Solomon,* General Counsel, and *Howard E. Wahrenbrock,* Solicitor, Federal Power Commission, were on the brief, for respondent.

Mr. Sherman S. Poland, with whom *Mr. Donald B. Robertson* was on the brief, for intervenor Skelly Oil Company in No. 19796, argued on behalf of all intervenors. *Mr. Oliver L. Stone* was on the brief for intervenor Shell Oil Company. *Mr. Richard F. Generelly* was on the brief for intervenors Callery Properties, Inc., H. L. Hawkins, H. L. Hawkins, Jr., and Monsanto Company. *Mr. J. Evans Attwell* was on the brief for intervenor W. S. Kilroy, et al. *Mr. James K. Schooler* was on the brief for intervenor Humble Oil & Refining Company. *Messrs. Carroll L. Gilliam* and *Philip R. Ehrenkranz* were on the brief for intervenor Pan American Petroleum Corporation. *Messrs. Bernard A. Foster, Jr.* and *Donald B. Robertson* were on the brief for intervenors Mrs. James R. Dougherty, et al., Edwin M. Jones Oil Company and W. A. Stockard, et al. *Messrs. Morton L. Simons* and *Bertram D. Moll* also entered appearances for petitioner in No. 19919. *Mr. Robert E. May* also entered an appearance for intervenor Skelly Oil Company. *Mr. Robert W. Henderson* also entered an appearance for intervenor, Lamar Hunt.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and TAMM, *Circuit Judge.*

BAZELON, *Chief Judge:* We are to review a Federal Power Commission (FPC) order certificating sales of natural gas from producers to interstate pipelines. The sales were certificated in the *Hawkins* (Texas Railroad

District No. 3)[1] and *Sinclair* (Texas Railroad District No. 2)[2] proceedings, which are consolidated here.

The New York Public Service Commission challenges the certificates on three grounds. First, there was no showing of public need for the gas. Second, the "in-line" price was too high. And third, the FPC erroneously postponed deciding whether the producers should be required to refund amounts in excess of the in-line level which were collected under a temporary certificate. Superior and Continental (producers) challenge the in-line price as too low. Superior claims also that the FPC set too high an interest rate on funds which would be retained by the producers in excess of the amount allowed by the permanent certificates. The intervenors support the FPC's determinations, although some of them think that the in-line price should have been higher.

I

The Public Need for the Gas

We face some confusion about whether New York properly raised the issue of public need. At the prehearing conference in the *Hawkins* proceeding, New York limited the issue to whether or not the *pipelines* needed the gas.[3] However, in its exceptions to the Examiner's initial decision New York said, "In view of (a) the absence of any evidence of public need for the gas and (b) the many indications that pipelines in the Gulf Coast area are presently suffering from take-or-pay problems,[4] the applica-

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[1] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, Docket Nos. G-18077, *et al.*

[2] *Sinclair Oil & Gas Company, et al.*, Docket Nos. G-16760, *et al.*

[3] H.A. (*Hawkins* Joint Appendix) 7-19.

[4] New York claimed that the pipelines were obligated to take or pay for more gas than they could use. [Footnote added.]

tion should be denied."'[5] This raised the issue of the *public's* need for the gas. New York used the take-or-pay problems to alert the FPC to a potentially harmful situation and obligate it to give reasons why, in spite of those problems, the sales should be certificated.[6] New York reiterated its position in a petition for rehearing before the FPC.[7]

In *Sinclair*, New York raised the issue in the same terms as in the *Hawkins* proceeding.[8] And again, after the FPC refused to consider the issue, New York repeated its contentions in a petition for rehearing.[9] Since New York presented the issue of public need in its petition for rehearing in both the *Hawkins* and *Sinclair* proceedings, our review is authorized by Section 19(b) of the Natural Gas Act.[10]

The most obvious element of public necessity in the demand for the gas. In several cases decided before CATCO, the existence of an unsatisfied market was considered of great importance. For example, in *Oklahoma Natural Gas Co.* v. *Federal Power Commission*[11] the court allowed the need in the Chicago market to outweigh even considerations of the price of the gas. And in *United Gas Improve-*

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[5] H.A. 268.

[6] This argument is analogous to the argument that the FPC must give reasons why a certificate should be granted even though the price is out of line. The out-of-line price alerts the FPC to the potentially harmful situation. See *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959) (CATCO).

[7] H.A. 311-12.

[8] S.A. (*Sinclair* Joint Appendix) 198.

[9] S.A. 243-44.

[10] 15 U.S.C. § 717r (b) (1964).

[11] 103 U.S.App.D.C. 256, 257 F.2d 634, *cert. granted*, 358 U.S. 877 (1958), *cert. dismissed*, 358 U.S. 948 (1959).

ment Co. v. *Federal Power Commission*,[12] because the demand for the gas was shown to be great, the court did not insist that the FPC regulate the initial price.[13]

Since these cases were decided, the Supreme Court has held, in CATCO, that the initial price is extremely important. But CATCO does not suggest that the public's need for the gas is irrelevant. Indeed, the Court seems to have imposed on the producer the burden of proving public need before certification. In part, the Court reversed the Commission's certification in CATCO because there was no "support whatever in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas.' "[14]

But market demand is not the only relevant factor. In the *Transco* case,[15] the question was whether the FPC, "through its certification power, may prevent the waste of gas committed to its jurisdiction."[16] The Supreme Court said "no one [disputed] that natural gas is a wasting resource and that the necessity for conserving it is paramount."[17] The dispute was whether the "public convenience and necessity," referred to in § 7(e) of the Natural Gas Act, included considerations of conservation, or whether the FPC was precluded from considering that

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[12] 269 F.2d 865 (3d. Cir.), *vacated sub nom. Public Service Commission* v. *Federal Power Commission*, 361 U.S. 195 (1959).

[13] See also *Department of Conservation* v. *Federal Power Commission*, 148 F.2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), in which the court allowed the need for the gas to outweigh evidence that the gas was going to be put to an inferior use.

[14] *Supra* note 6, at 393.

[15] *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961).

[16] *Id.* at 8.

[17] *Ibid.*

factor. In affirming the Commission's action, the Court decided that conservation was relevant to public convenience and necessity. *Transco* was a pipeline certificate case, and the instant case is a producer certificate case. But pipelines and producers are certificated under the same statute, and, at least without strong evidence, we should not say that conservation is relevant in one case and not in the other. The public's interest in conserving gas is no less when the applicant for a certificate of public convenience and necessity is a producer.

The parties do not explicitly deny the relevance of market demand and conservation, but we are asked to disregard the issue of public need for four other reasons. First, it was not properly raised below. We have already dealt with that argument. Second, the public need for the gas should be determined in a pipeline certificate or pipeline rate case, not in a producer certificate case. Third, the FPC can postpone consideration of public need until it completes its pending rule-making proceeding on the problem of take-or-pay contracts. And fourth, "because of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for future, even though the supplies may be slightly in excess of their present-day needs."[18] We will deal with the last three contentions in turn.

1. According to New York, the issue of public need should not be decided only in a pipeline certificate or rate case. New York argues that if the gas is sold to a pipeline which is unable to use it, and if the pipeline must either take the gas or pay for it nonetheless, then the loss sustained by the pipeline will be reflected in the price charged to the public utility and ultimately in the price charged to the consumer. The FPC could eliminate

[18] H.A. 280.

this problem by ruling that the pipeline's investment in the unused gas was "imprudent" and refusing to allow the pipeline to add its cost to the rate base. However, the FPC has cited no case in which the cost of unused gas was eliminated from the rate base. To the contrary, there is some indication that the FPC may be allowing at least part of the loss to be shifted to the consumer.[19] Indeed, it would seem difficult for the FPC first to certificate a sale to a pipeline and then to claim that the pipeline's investment in the gas was imprudent.

Regardless of how the FPC uses its "imprudent investment" doctrine, there is another reason why the public's need for the gas must be considered in a producer certification. As we have indicated, the FPC must prevent wast of natural gas. One of the most important ways is to control and limit the end uses of gas.[20] The FPC must compare various uses and determine which ones are more economically necessary. If the proposed sale is to a consumer who will use the gas in an economically "inferior" way then the sale is not certificated. Of course, to do the job properly the FPC must consider *all* alternative uses.[21] It recognizes this responsibility in pipeline certificate cases.[22] But if it refuses to consider the issue in producer certificate cases and waits for pipeline cases, some of the alternatives will already have been eliminated. In the pipeline case the FPC can direct the gas towards one rather than another of the pipeline's customers but

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[19] See *United Gas Pipe Line Co.*, 31 FPC 1180, 1191-92 (1964), and *United Gas Pipe Line Co.*, 32 FPC 1515, 1519 (1964).

[20] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15, at 8.

[21] "[Section] 7(e) requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Co.* v. *Public Service Commission*, *supra* note 6, at 391. [Emphasis added.]

[22] *Federal Power Commission* v. *Transcontinental Gas Corp.*, *supra* note 15.

without considering the customers of other pipelines which might have bought the gas. Thus, the gas may go ultimately to consumers whose use will be less economically beneficial than the use of other potential purchasers.

Because the FPC refused to consider the issue of need, this record does not indicate whether or not this gas has been wasted.[23] However, such wasting is a possible result of the alleged oversupply situation of some of the pipelines here.[24] The possibility that gas may be wasted requires that the FPC determine the issue of need *before* the initial sale to a pipeline. Otherwise it may be too late to protect the public interest.[25]

2. The FPC argues that "insofar as there may be any [take-or-pay] problem for [the pipelines in the instant case], it is one not peculiar to them and may therefore be resolved . . . by the Commission's reservation of the matter for consideration in the pending rulemaking proceeding on that subject . . . ."[26] As we have noted, though, the take-or-pay problem does not exhaust the considerations relevant to an informed decision about the public's need for the gas. It is unlikely that any decision the Commission makes in its rule-making proceeding would deal with the entire "need" issue. The rule-making pro-

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[23] We do not know whether anyone else could have taken the gas, or, if so, whether he served markets which would differ from the markets served by the pipelines here.

[24] There is a suggestion that the gas involved in this case was obviously needed because some of it has already been consumed. The issue of need, however, is not decided simply because someone will consume the gas. The real questions are whether the consumer was forced, or will be forced, to pay more for the gas because of the pipeline's poor take-or-pay situation and whether the gas could have been put to a superior use.

[25] See *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[26] Brief for Respondent, p. 29.

ceeding on which the FPC relies has been pending for five and a half years,[27] and we do not know when a decision will be reached. We can only speculate about what that decision will be and how it will apply to the question of public need. We think such an uncertain proceeding should not excuse the Commission from its present responsibilities.[28]

3. The FPC's last argument is that the "nature of the gas business and the obligation of pipeline companies to the consuming public" sometimes require a poor take-or-pay situation.[29] If this means that other considerations may outweigh the pipeline's poor take-or-pay situation, we agree. And these considerations may also outweigh the considerations of conservation inherent in the case. But there is no evidence in the record which indicates what these considerations are or how they are relevant to this certification. If public convenience and necessity requires this certification, this must appear from something more than the FPC's broad and unsupported statement about the "nature of the gas business" in a case where the FPC thought the issue irrelevant.[30]

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[27] Docket No. R-199, 26 Fed. Reg. 4615 (May 22, 1961).

[28] See *Public Service Commission* v. *Federal Power Commission*, 117 U.S.App.D.C. 287, 292-93, 329 F.2d 242, 247-48, *cert. denied sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963 (1964). A day before this opinion was issued, we were informed that the FPC completed its rule-making proceeding on January 18, 1967. The new rule does not affect our decision to remand this case for a determination of public need. That rule is subject to further review. In any event, we think the FPC should decide, in the first instance, how the new rule relates to the issue of whether the public needs the gas involved in this case. Therefore, on the remand we order herein, the FPC will make that determination according to the principles stated in this opinion. See discussion following note 30 *infra*.

[29] H.A. 280.

[30] In CATCO the Supreme Court also rejected an unsupported statement about the public need. *Supra* note 6, at 393.

Although we remand this case so that the FPC can consider the issue of public need, we recognize an obvious tension between the statutory requirement that it do so and administrative feasibility. The public convenience and necessity includes many considerations, but if there is to be any effective certification of producers the FPC must sometimes stop short of the ideal.[31] It is evident, too, that the FPC must have great latitude in its choice of procedures. We are not demanding that the FPC hold a long and complex hearing in each of its many producer application cases. But it does not seem too difficult to have the producer's customers or the pipeline's customers testify about the take-or-pay situation.[32] Regarding the broader aspects of the "nature of the gas business" or of conservation, the FPC may consider studies of its staff. It may, after study, issue policy statements. These studies or statements may be relevant to large geographic areas, or perhaps to the whole gas industry. Then it would not be necessary to relitigate need in each case; the FPC need only show that the broad statement or study covers the particular certification before it. In short, we do not now prescribe any particular method for deciding need. Nor is our discussion of what public need means exhaustive.

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[31] *Cf. United Gas Improvement Co.* v. *Callery Properties,* 382 U.S. 223 (1965). *Callery* does not apply directly though. There, no one doubted the need for the gas. The dispute was over the price. The longer it took to set the price, the more the consumer was hurt. Understandably, the Supreme Court wanted the Commission to act quickly and efficiently. The entire purpose of the Act is to protect the consumer. Here, New York claims that this sale should not be certificated at all, no matter at what price and no matter how quick the procedure. It is counter-productive to streamline procedure when the effect is to prevent the Commission from considering the possibility that the sale itself would not be in the public interest.

[32] Or perhaps the Commission can rely upon a previously decided producer or pipeline certificate case if the decisions there are relevant to the applications pending before the Commission.

We decide only that when a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a permanent certificate to a producer.[33] "[A] certificate shall be issued . . . authorizing the . . . sale . . . if . . . the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."[34]

II

The In-Line Price

The second major dispute in this case concerns the FPC's determination of the in-line price. Since the CATCO decision, the FPC has been granting permanent certificates of public convenience and necessity only if the price of the gas is in-line. The question is, in line with what? Judging from these and other FPC proceedings, the "line" is determined as follows: First the Commission chooses a time period and a geographical area which it considers relevant[35] and lists all the prices at which gas was sold at that time and in that area. Then it eliminates prices which are "suspect" either because they are presently under litigation or Commission review

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[33] *Cf. Federal Power Commission* v. *Texaco*, 377 U.S. 33, 42-44 (1964), and *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 525-26 (1964).

[34] 15 U.S.C. § 717f (e) (1964).

[35] Here the area for the *Hawkins* proceeding was Texas Railroad District No. 3, and the area for the *Sinclair* proceeding was Texas Railroad District No. 2. In both proceedings there were two relevant time periods—in *Hawkins* from January 1, 1958, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to January 1, 1964, (post-Policy Statement period), and in *Sinclair* from January 1, 1957, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to March 10, 1964, (post-Policy Statement period).

or because they are similar to a price under a cloud.[36] When the price array is completed the FPC makes several calculations, for example, the average price, the median price, the weighted average price, and the price at which substantial volumes of gas flowed in interstate commerce. The FPC adjusts some of these prices by assigning differing weights to the various prices which form the price array. At least one Commissioner in our case gave some weight also to a guideline price announced first in 1960 and subsequently revised.[37] The Commission considers these weights and the adjustments, and then picks a price.[38] Here the Commission set the in-line price at 15¢ per Mcf for District No. 2 during the period before the Policy Statement (September 28, 1960) and at 16¢ for the post-Policy Statement period.[39] For District No. 3, the prices were 16¢ and 17¢ respectively.

The petitioners have many disagreements with what the FPC did in this case. Continental and Superior think the Commission should have given more weight to certain 20¢ sales which were permanently certificated, to sales which were temporarily certificated, and to contract prices even before these prices are tested in any kind of certificate proceeding.[40] They also claim that the Commission

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[36] See, *e.g.*, *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 (1961).

[37] See Commissioner Bagge's concurring opinion in *Hawkins*. H.A. 297.

[38] The proceedings in this case provide some examples of the Commission's methods. See the appendix attached to this opinion.

[39] The pre- and post-Policy Statement periods are described fully in note 35 *supra*.

[40] Their claim that the Commission disregarded these prices cannot be based on the record in this case. See, *e.g.*, S.A. 226 and H.A. 285-86 quoted in the appendix *infra*. The producers' claim is reduced to the contention that not enough weight was given.

erroneously considered certain sales at 14¢ and less, erroneously excluded intrastate sales, and erroneously used estimated rather than actual volumes when calculating weighted average prices. In short, they claim that the Commission acted arbitrarily and without any recognizable standards.

New York claims that the FPC should have given no weight to contract prices or to sales made pursuant to temporary certificates, and that it erroneously considered certain permanently certificated prices. New York says these permanently certificated prices were incorrectly determined and therefore should not be allowed to affect subsequent in-line prices.

To properly weigh these claims we must understand the purpose of in-line pricing.

In-Line Pricing

The concept of an in-line price is an artificial one created by the Supreme Court, the Courts of Appeals, and the Commission for the sole purpose of protecting the consumer. Before the concept existed, the FPC usually proceeded in the following way. A producer who wanted to sell gas in interstate commerce applied to the Commission for a certificate of public convenience and necessity under § 7 of the Act. When the certificate was granted, the producer-seller and the pipeline-buyer executed the sale at a price which they had already negotiated. If that price was too high, the FPC, either on its own motion or acting on the complaint of an interested party, could institute proceedings under § 5 of the Act to determine the "just and reasonable" price, after which the producer was forced to lower his price accordingly. However, since § 5 does not provide for refunds, the producer was allowed a "windfall" (with a consequent "squall" for the consumer) during the period between commencement of the

sales and the conclusion of the hearing under § 5.[41] Section 5 hearings were long and complicated, and the windfall could be quite large. The ordinary protections of the market place did not exist in this regulated monopoly industry. The producer, of course, was interested in extracting the highest price from the buyer. But the buyer did not have an equal interest in keeping the price down because the price he paid became part of his rate base and was ultimately paid by the consumer.[42] Presumably the consumer did not have any choice except to buy the fuel at the price which was set.[43]

The procedure after the invention of in-line pricing changed in one significant way. Now, when the FPC grants a certificate of public convenience and necessity, a price condition is usually attached. A dissatisfied producer who wants to sell at a higher price can file a new rate schedule under § 4 of the Act subject to his contract with the pipeline.[44] These rates become effective after thirty days unless challenged by the FPC. Even if challenged, the new rates become effective after five months if the Commission has not completed its "just and reasonable" determination by that time. Eventually, then, the producer may charge whatever price he wants.[45] However,

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[41] *Atlantic Refining Co.* v. *Federal Power Commission, supra* note 6, at 390.

[42] *Atlantic Refining Company* v. *Federal Power Commission,* 115 U.S.App.D.C. 26, 28 at n. 11, 316 F.2d 677, 679 at n. 11, (1963).

[43] *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F.2d 133, 135 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.,* 368 U.S. 823 (1961).

[44] *Cf. Texaco* v. *Federal Power Commission,* 290 F.2d 149, 156 (5th Cir. 1961).

[45] The Commission may, however, impose a temporary moratorium on price increases. See *United Gas Improvement Co.* v. *Callery Properties, supra,* note 31. A price moratorium was imposed in the instant case, but it is not before us on appeal.

by filing under § 4, the producer becomes subject to payment of refunds if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices.[46]

The Use of Contract Prices

From the description of in-line pricing it is evident that the FPC cannot use the prices at which producers and pipelines contract as a basis for setting the price. The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control.[47]

One Court of Appeals has viewed the Commission's reliance on contract prices as the reason for the CATCO opinion.

> [W]e perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the [following] criticism . . . : that the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned*, that they had been bargained for at arm's

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[46] The Act was so framed as to afford a complete, permanent and effective bond of protection from excessive rates and charges. *Atlantic Refining Co.* v. *Public Service Commission, supra* note 6, at 388.

[47] See *Atlantic Refining Company* v. *Federal Power Commission, supra* note 42, at 28, n. 11, 316 F.2d at 679, n. 11.

> length, or that they were not higher than a price someone else was then paying in the area.[48]

And this court has been wary of allowing the Commission to avoid its responsibility by relying on prices negotiated in the market place.[49]

The Use of Temporary Certificates and the Policy Statement

If the Commission relies on prices over which it has never exercised control, it effectively abdicates its responsibility to protect consumers. Although prices contained in temporary certificates are not completely without Commission control, neither are they subjected to thorough consideration. According to the statute, temporary certificates are granted only "in cases of emergency" pending determination of an application for a permanent certificate. Temporaries are granted in *ex parte* proceedings "without notice or hearing."[50] No record is made, so it is impossible for a court to know on what basis the Commission granted the certificate. Accordingly, standards on review are minimal. This court has upheld a temporary certificate although we admitted that the summary nature

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[48] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 43, at 135-36. [Emphasis in the original.] See also *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F.2d 147, 148 (5th Cir.), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965 (1961).

[49] *Public Service Commission* v. *Federal Power Commission*, 109 U.S.App.D.C. 289, 291, 287 F.2d 143, 145 (1960), and *Public Service Commission* v. *Federal Power Commission*, 109 U.S.App.D.C. 292, 296, n. 4, 287 F.2d 146, 150, n. 4 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Public Service Commission*, 365 U.S. 880 (1961).

[50] 15 U.S.C. § 717f (c) (1964).

of the proceeding precluded us from passing intelligently upon the parties' contentions.[51]

Recently, though, the FPC has attempted to make temporary certification a more considered decision. In 1960 it promulgated a Policy Statement which included guideline prices beyond which it would not certificate sales, even temporarily. In theory, the Policy Statement could justify inclusion of temporary certificates in the permanent certificate price array, since the Policy Statement could provide some degree of intelligent control over temporary prices.

In fact, however, the Policy Statement has not had a curative effect. The FPC itself seems to give the Statement very little (and very ambiguous) weight. In its first statement, the FPC said that "these price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights."[52] When the State of Wisconsin petitioned this court to review the Policy Statement, the FPC moved for dismissal on the ground that the Policy Statement "does not modify the procedures under which certificates are granted. . . . It denies no rights and imposes no obligations."[53] We agreed and dismissed Wisconsin's petition for review.[54] The Commission has repeatedly

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[51] *Public Service Commission* v. *Federal Power Commission*, 117 U.S.App.D.C. 195, 199, 327 F.2d 893, 897 (1964). See also *American Liberty Oil Co.* v. *Federal Power Commission*, 301 F.2d 15 (5th Cir. 1962). And see *Public Service Commission* v. *Federal Power Commission*, *supra* note 28, at 294, 329 F.2d at 249, in which this court characterized temporary certificates as being "without notice or hearing or mature consideration."

[52] 24 FPC 818, 819 (1960).

[53] *Wisconsin* v. *Federal Power Commission*, No. 16118 Motion to Dismiss, p. 2 (1961).

[54] *Wisconsin* v. *Federal Power Commission*, 110 U.S.App.D.C. 260, 292 F.2d 753 (1961).

held that the Policy Statement does "not purport to fix the 'in-line' price."[55] And recently the Commission characterized the guideline prices as being relevant only when "no protests or petitions to intervene [are] filed" in the certification proceeding.[56] In the instant case, only one Commissioner relied upon the guideline prices; two ignored them, and two felt that reliance upon the Policy Statement would be impermissible.

Further, we cannot know whether the guideline price actually controls temporary prices unless we know what the guideline price is based on. For example, it is conceivable that temporary certificates have significant influence upon the guideline price. If so, the guidelines do not control temporary prices. In any event, it is impossible to determine how the guidelines were set. The Commission listed a number of very general factors but was not specific about what the factors were or how they were considered. When asked, the FPC refused to disclose the basis for its determination.[57]

A still more persuasive reason for eliminating temporary prices from the permanent price array is the way their use may injure consumers. The effect may be a slow escalation of in-line prices: An in-line price is set; the guideline price is set somewhat higher; temporary certificates are granted at the guideline price; the new temporary certificates are used in determining a new in-line price, which will be higher than the first in-line

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[55] *Amerada Petroleum Corp.*, 29 FPC 171, 172 (1963), *Union Texas Petroleum*, 29 FPC 273, 275 (1963), *Union Texas Petroleum*, 29 FPC 733, 734 (1963).

[56] 30 Fed. Reg. 4670, 4671 (1965). See also *Amerada Petroleum Corp., supra* note 55, at 172 and *Union Texas Petroleum*, 29 FPC at 275 (1963).

[57] See, *e.g.*, Nos. 7781, *et al.*, *Sunray DX Oil Co.* v. *Federal Power Commission*, (10th Cir. Dec. 9, 1966), Op. pp. 15-19; *Amerada Petroleum Corp., supra* note 55.

price; the new in-line price raises the guideline price; and then the spiral begins again. Although, in fact, we cannot isolate so clearly the effect of the temporaries and the guidelines, there can be no doubt that an escalation has occurred, and in a manner similar to the process described.[58] This process contradicts CATCO's admonition to hold the line in the interim period between the sale of gas and the determination of just and reasonable rates. According to CATCO, one reason why the consumer needs protection during the interim period is that the period is often long.[59] Under the present administration of the in-line price doctrine the amount of protection for the consumer decreases as the length of the interim period increases. The longer it takes to determine a just and reasonable price, the higher the in-line price becomes, and the consumers' potential refund drops accordingly.

There is a final, and completely separate, reason why temporary prices should not affect the in-line price. The

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[58] In *Texaco Seaboard*, 29 FPC 593 (1963), the Commission found the Texas Railroad District No. 3 in-line price to be 16¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 17¢. 29 FPC 590 (1963). Now the Commission finds that the in-line price for District No. 3 has jumped to 17¢.

In *Hassie Hunt Trust*, 30 FPC 1438 (1963), the Commission found the District No. 2 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 30 FPC 1435 (1963). Now the Commission finds that the in-line price for District No. 2 has jumped to 16¢.

In *Skelly Oil Co.*, 28 FPC 401 (1962), the Commission found the District No. 4 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 28 FPC 441 (1962). Recently the Commission found that the in-line price for District No. 4 has jumped to 16¢. See *Sunray DX Oil Co.* v. *Federal Power Commission*, *supra* note 57.

[59] *Supra* note 6, at 389.

first court to discuss in-line prices held that prices which were suspect because they were under a cloud of court or Commission review could not be used in the permanent price array.[60] Since then almost every court,[61] including the Supreme Court,[62] has accepted the suspect price doctrine. The suspect price doctrine clearly includes temporarily certificated prices. Temporarily certificated prices may be, and often are, changed by the Commission. They are "subject to judicial review."[63] Prices that are so particularly subject to the hazard of change do "not provide a reasonably reliable basis upon which to predicate a price line."[64] And, acceptance of temporarily certificated prices has, in fact, had the effect of "creating a standard by which the questioned rates [are] judged."[65]

The producers argue, contrary to our holding, that temporarily certificated prices and contract prices must influence the in-line price. They rely on suggestions in some opinions that the line should "reflect current conditions in the industry."[66] This argument was adopted recently by the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*[67] which held that it is per-

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[60] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 36.

[61] See, *e.g.*, *Public Service Commission* v. *Federal Power Commission*, 109 U.S. App. D.C. 292, *supra* note 49 and *Public Service Commission* v. *Federal Power Commission*, *supra* note 28.

[62] *United Gas Improvement Co.* v. *Callery Properties*, *supra* note 31, at 227.

[63] *Ibid.*

[64] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 36, at 824.

[65] *Ibid.*

[66] See, *e.g.*, *ibid.*

[67] *Supra* note 57.

missible for the FPC to consider temporaries and contract prices.

However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated.[68] On this basis the court refused to apply the suspect price doctrine and approved the FPC's method of determining the in-line price. "[W]hen no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries."[69] In our case there is a substantial volume moving under permanent certificates.[70] We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.

Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need.

We are not suggesting, of course, that current conditions are never relevant to the FPC. In a § 4 or § 5 hearing the FPC considers current conditions in order to set a just and reasonable price. However, the courts have already rejected attempts to import standards relevant to § 4 and § 5 hearings into § 7 hearings. For example, in

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[68] *Supra* note 57, at Op. p. 24.

[69] *Supra* note 57, at Op. p. 26.

[70] See, *e.g.*, H.A. 282, 284-86, 299-300; S.A. 220, 223, 226-27.

Callery the producers tried to introduce economic and financial evidence, but the FPC disregarded it.[71] The Fifth Circuit reversed the Commission. In essence the court said that this evidence was relevant to current conditions in the industry, and that these conditions were relevant to the determination of the in-line price.[72] The Supreme Court rejected this argument summarily. "To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices."[73] In the recent Tenth Circuit case the producers tried to introduce the same kind of evidence. The court responded:

> The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity.[74]

We think this response, which is properly based on the logic of *Callery* and CATCO, is inconsistent with the same court's acceptance of temporaries and contract prices. If the courts and the FPC will not allow consideration of

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[71] See *Callery Properties* v. *Federal Power Commission*, 335 F. 2d 1004, 1009 (5th Cir. 1964), for a description of the evidence.

[72] *Id.* at 1013.

[73] *Supra* note 31, at 227-28. In CATCO the Supreme Court had already recognized the difference between the standards of a § 7 and a § 4 or § 5 proceeding. "[T]he Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." *Supra* note 6, at 390.

[74] *Supra* note 57, at Op. pp. 14-15.

evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions.

The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. For example, in a particular case, the FPC may feel that an in-line price which is too low subjects the producers to too much risk. And this risk may endanger investment in the industry. In that event the FPC would have to weigh this danger against the diminution of consumer protection. But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection.

Finally, it is argued that elimination of temporarily certificated and contract prices from the price array will cause a "price-freeze." But our proposed decision will not freeze the price of gas. If the producer is dissatisfied with the in-line price he can file a new, and higher, rate schedule under § 4 of the Act.[75] Neither will our decision permanently freeze the in-line price for an area. We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing. But we do not

[75] See note 45, *supra*.

hold that the FPC can never raise the price line in the interim period. We hold only that the Commission has advanced no reason why an escalation is justified in this case.

Other Claims Regarding the In-Line Price

New York argues that the FPC erroneously determined the pre-Policy Statement in-line price for District No. 3, because it gave weight to prices "tainted" by other prices which were permanently certificated in 1956-57. New York thinks these 1956-57 prices were incorrectly certificated "in light of *CATCO* and the subsequent court cases."[76] Although sometimes it may be wise to re-examine certificated prices, we think that the FPC may give weight to permanently certificated prices even if they were certificated under standards later changed by the courts. This area of the law is constantly changing, and if we require the Commission to re-examine earlier certifications whenever there is a new decision, hearings under § 7 will never end. The proper rule was stated by the Ninth Circuit.

> No doubt there are many certificated prices—some under unconditional certificates and others . . . conditioned, some established in contested proceedings and others not contested—which might be different, and lower, if the Commission were passing on them under section 7 today. But this, we think, does not *require,* although it may *permit,* the Commission to disregard them or to give little weight to them in deciding what is an appropriate price line to which to refer.[77]

Though the FPC is not required to re-examine permanently certificated prices, neither is it required to

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[76] Brief for Petitioner, p. 27.

[77] *California* v. *Federal Power Commission,* 353 F.2d 16, 23 (1965). [Emphasis in the original.]

include a price in the price array simply because the price was sanctioned in a permanent certificate. The Commission may ignore a price if it has a good reason to do so.[78] In this case, over Superior's objection, the Commission refused to give full weight to certain 20¢ sales. According to the FPC these and similar sales should be discounted because "they either have subsequently been set aside . . . or would have been set aside . . . save for the procedural defect in the PSC review action."[79] This reason is adequate, and we do not think the Commission abused its discretion by not giving full weight to the 20¢ sales.

Lone Star Gathering Company

New York claims that Lone Star is a gathering company rather than a pipeline, and therefore sales to Lone Star should be certificated at the in-line price less the cost of gathering. Since oral argument we have been informed that in Opinion No. 505 the FPC granted Lone Star and United Gas Pipe Line Company permission to consolidate some of their facilities.[80] The FPC was to rehear that case beginning December 6, 1966.[81] Since we do not know what effect the Commission's final decision will have on the issue before us, we reserve decision on New York's claim.

We need not deal with any of the other contentions regarding the in-line price. Some of the parties may now wish to abandon some of their claims. On remand the FPC can deal with the remaining claims according to the principles announced in this opinion.

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[78] A price which is not "comparable" is not considered even if it is permanently certificated. See *United Gas Improvement Co. v. Federal Power Commission, supra* note 36, at 823.

[79] H.A. 284.

[80] *Lone Star Gas Company, et al.*, Docket Nos. CP65-118, *et al.*, issued August 22, 1966.

[81] Order issued October 14, 1966.

III

Refunds

New York argues that the FPC erroneously postponed a decision about whether the producers must refund amounts which were collected, pursuant to temporary certificates, in excess of the in-line level set in the permanent certificate. The FPC answered that it had been awaiting the Supreme Court's action in the *Callery* case which was not decided until December of 1965.[82] According to the FPC's brief, its decision in this case "should be forthcoming in the near future" now that the Supreme Court has decided *Callery*.[83] The Commission took its promise seriously, and on July 22, 1966, it issued Opinion No. 498 which required refunds from some of the producer-applicants involved in the *Hawkins* proceeding.[84] We may assume that a decision in *Sinclair* will follow.

IV

Interest Rates

Superior attacks the FPC's order which sets interest rates for some refunds at 7% and for others at 4½%. Since Superior did not make this objection in an application for rehearing before the Commission, we cannot deal with the claim.[85] In any event, at least on the record and briefs now before us, the Commission's justification for the 7% interest rate seems reasonable.

The Commission's order will be set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

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[82] *Supra* note 31.

[83] Brief for Respondent, p. 37.

[84] *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, Docket Nos. G-18077, *et al.* The order was amended in Opinion No. 498-A (December 6, 1966).

[85] 15 U.S.C. § 717r (b) (1964). *Cf. Utah Power & Light Co.* v. *Federal Power Commission*, 339 F.2d 436 (10th Cir. 1964).

WILBUR K. MILLER, *Senior Circuit Judge*, dissents.

APPENDIX

Statements Explaining the Method Used to Determine the in-Line Price

In *Hawkins* the hearing examiner explained his decision in the following terms:

> It will be observed from the foregoing distribution of prices for the period September 28, 1960 through December 31, 1963 [the price array], that the largest concentration of sales occurred at 14 cents and 15 cents per Mcf, and that the largest volumes of gas were sold at or below 15 cents per Mcf—more than 80 percent. The average sales price for the period was approximately 14.67 cents and the average sales price by volume was approximately 15.51 cents per Mcf. In respect to the period January 1, 1958 through September 27, 1960 more than 73 percent of the sales occurred at 16 cents or below and these sales account for more than half the volume. The average sales price for this period is 15.41 cents per Mcf and the average sale price by volume is approximately 16.76 cents per Mcf. When the two periods are combined (January 1, 1958 through December 31, 1963) it is apparent that there are two major concentrations of sales namely at 14 cents and 15 cents and minor concentrations at 13.5, 14.5, 16.2 and 20 cents. The average price of the 94 sales is 15.11 cents per Mcf and the average by volume is 16.43 cents per Mcf.
>
> In view of the foregoing and the evidence adduced there is ample support for finding that 16 cents per Mcf at 14.65 psia is an appropriate "in line" price applicable to producer contracts in this proceeding for the period prior to September 28, 1960. The Staff witness found, however, that 16.2 cents was the appropriate "in line" price applicable to the period follow-

ing September 28, 1960 and in doing so stressed the significance of the sales which were made at 16.2 cents per Mcf. (Four sales before September 28, 1960 and three afterwards.) We do not think that this is decisive. Indeed there is evidence which tends to show that a higher price may be justified for the pre-Policy Statement period than for the post-Policy Statement period.

It is manifest that the "in line" price is neither the highest price nor the lowest price at which gas is sold from a particular area in interstate commerce. It is also clear that it is not the general average of prices at which gas is sold in a particular period or indeed the mathematical weighted average. Consideration necessarily must be given, however, to the number of sales as well as to the volume—large volumes frequently selling at higher prices than low volumes. Consideration should be given to numerous factors depending upon individual circumstances from one case to another. Consideration must also be given to the Commission's Statement of General Policy No. 61-1, and to policy of the Natural Gas Act as heretofore construed by the Commission and by the courts particularly by the United States Supreme Court in the CATCO case. *Atlantic Refining Co.* v. *P.S.C.*, 360 U.S. 378. In view of these factors and all the facts of record we conclude that the subject sales in this proceeding from the Texas Railroad District No. 3 made under contracts executed both before and after the Policy Statement dated September 28, 1960 should be conditioned at a price no greater than 16 cents per Mcf at 14.65 psia. H.A. 248-50.

When the Commission reviewed the examiner's initial decision, it explained the method as follows:

For the pre-Policy Statement period we agree with the examiner that 16 cents per Mcf . . . is the appro-

priate in-line price. . . . As can be seen from the table above [the price array], there are comparatively large volumes of gas sold at the 16.0 and 16.2-cent levels, small volumes at 17.5 and 18.0, and very large volumes at 20 cents. 38 sales (72 percent) are at 16 cents or below, while a little more than half the volume is sold at 16 cents or below. . . . Arithmetically the large volumes at 20 cents would have a strong effect on the weighted average of 15.16 cents per Mcf, but these should be discounted. . . .

The producers, on the other hand, argue that the 20 cent sales, if not given full weight, should be given some weight. The Commission adopted this consideration in *Sun Oil Co.* . . . A ceiling at 16 cents for the pre-Policy Statement period, in effect, gives some weight to the prices above 16 cents as well as the contract prices and the prices under temporary certificate, for if we gave no consideration to the prices above 16 cents, the ceiling would be set at a lower level, since ordinarily we do not set the ceiling price at the highest level.

As for the post-Policy Statement period, it may be observed that there are nine sales and moderate volumes at 15 cents, three sales and moderate volumes at 16.2 cents, one sale and a small volume at 16.5 cents, and three large sales at 18.0 cents. As the producers argue, the fact that the 18-cent prices were established in abridged hearings should not detract from their weight in setting the line. . . .

We are of the opinion that 17.0 cents per Mcf . . . is the in-line price for the period following September 28, 1960. It is our judgment that this conclusion gives appropriate weight to the comparatively large volumes sold under permanent certificates at 18.0 cents per Mcf while reflecting the weighted average price of 16.17 cents per Mcf. In addition, a 17.0 cent price clearly

gives some weight to the unconditioned contract prices and to the prices under temporary certificates. Finally, some 43 percent of the gas has been permanently certificated at a price higher than 17.0 cents. One proposed sale . . . is at 17.0 cents, under a contract dated October 1, 1963. Giving due consideration to all sales in the area during the period in question, an in-line price of 17.0 cents is fully justified. H.A. 284-286.

In *Sinclair* the trial examiner determined the pre-Policy Statement in-line price as follows:

> Applying the criteria for the determination of an in-line price, as developed by the numerous Commission and Court decisions following Catco, to the data in the foregoing tabulation, resulted in a numerically weighted average price of 16.68 cents per Mcf and a volumetrically weighted average price of 17.18 cents per Mcf. In according the proper evidentiary weight to the evidence of record, most reliance or the greatest weight has been accorded the 14 permanently certificated sales with an estimated first month's delivery volume of 460,575 Mcf. These sales and volumes do not "reflect current conditions in the industry" because of their limited nature. Having accorded the greatest weight to the permanently certificated sales and in giving appropriate consideration to temporary certificated sales at substantial volumes presently moving in interstate commerce, it is concluded the public convenience and necessity requires the natural gas here under consideration at an in-line price of 16.0 cents per Mcf at 14.65 psia.
>
> The in-lineness of the 16.0 cents per Mcf here determined may be further demonstrated. The Commission said in *Texaco-Seaboard Inc., et al.*, 27 FPC 482, 485, and *Hassie Hunt Trust (Operator) et al.*, 30 FPC 1438, 1445, ". . . as brought out in *Catco* and . . . in Texaco-Seaboard, the price line does not accord with

the highest price or prices permanently authorized but falls between the highest group of prices and the median price." Applying this test to Staff Chart 3, Exhibit 4, [the price array] . . . , reveals a median price of 14.57 cents (volumetric weighted average) which, when averaged with the highest price of 17.59 cents, produces an in-line price of 16.08 cents per Mcf.

A similar test further illustrates the in-lineness of the 16.0 price per Mcf.

Using *all* permanently (77) and *all* temporarily (35) certificated sales related to *all* volumes of natural gas (4,390,500 Mcf) moving in interstate commerce during the period after September 28, 1960, and through March 10, 1964, from District No. 2, a volumetrically weighted average price of 15.15 cents per Mcf is indicated. This median price when averaged with the highest temporarily certificated price of 18.00 cents per Mcf produces an in-line price of 16.57 cents per Mcf. S.A. 181-82.

Of the post-Policy Statement in-line price, the examiner said:

For the 22 sales being made in the 14.0 to 14.75 cent price level in the above tabulation [the price array] the numerically weighted average price is 14.24 cents and the volumetrically weighted average price is 14.35 cents per Mcf at 14.65 psia. However, the numerically weighted average price for the 29 sales is 14.58 cents per Mcf and the volumetrically weighted average price is 14.84 cents per Mcf at 14.65 psia. Considering the foregoing data and the evidence of record showing the history of prices and the price patterns in District No. 2, the Examiner is of the opinion that the present or future public convenience and necessity requires the natural gas here under consideration at an in-line price of 15.0 cents per Mcf at 14.65 psia. S.A. 185-86.

The Commission further explained the method of selecting the post-Policy Statement in-line price as follows:

> A totaling of all permanently and temporarily certificated sales in District No. 2 under contracts dated after September 28, 1960 and through March 10, 1964, exclusive of the sales to Valley at 14 cents, shows a listing of 101 sales involving a combined estimated first month volume of 4,060,388 Mcf. The median price on a volumetric basis is 16.00 cents and the volumetric weighted average price is 15.29 cents. Approximately 53 percent of the estimated first month volume covered by these sales moved in the price range of from 16 cents to 18 cents. On the basis of these calculations, and with recognition of the fact that the temporarily certificated sales represented most of the sales above the 16 cents price level, and should not be accorded undue weight, and giving some weight to the unconditioned contracts we conclude that the price of 16 cents per Mcf represents the correct post-policy in-line price of jurisdictional sales of natural gas in District No. 2. In reaching this result we may observe that if we confined ourselves to permanently certificated sales we would not find a line as high as 16 cents, for the next highest sales are at the 15.25 cents level. S.A. 225-26.

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JOHN F. DAVIS, CL

No. 1372

In the Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL POWER COMMISSION, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THURGOOD MARSHALL,
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The Commission adopted neither approach. It began by dividing all of the sales in question into two groups: those based upon contracts executed prior to September 28, 1960, the date that the Commission issued its Statement of General Policy No. 61–1, 24 F.P.C. 818, and those based upon contracts executed after that date. The Policy Statement, an interim measure to prevent escalation of the price of natural gas at the wellhead, announced a series of "guideline" prices for various gas-producing areas. These were prices which the Commission indicated would be acceptable to it in issuing certificates of public convenience and necessity.

The Commission determined that for sales antedating the policy statement the in-line prices were as the distributors urged, 15¢ in District No. 2 and 16¢ in District No. 3. For subsequent sales, however, it fixed a 16¢ in-line price in District No. 2 and a 17¢ in-line price in District No. 3. Chairman Swidler explained why the prices of similar sales which had previously been permanently certificated were not, in the Commission's view, the exclusive measure of in-line prices for new certificates (Sinclair J.A. 224–225):

> The permanently certificated prices reflect only a part of the market activity in the post-policy period. Permanent certification is granted only where the proposed price is within the applicable guideline price, and where there is no contest by any interveners. Thus to limit the consideration to permanent certificates would permit a price freeze and would render

> the hearing in this proceeding meaningless. The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested.
>
> At the time of the hearing the producers and the pipeline purchasers had experienced more than three years of doing business under the provisions of Statement of General Policy No. 61–1, and their transactions under temporarily certificated prices constituted a heavy and significant percentage of all jurisdictional sales in District No. 2. To the extent that "the price line is intended to reflect *current* conditions in the industry," *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 824 (CA9), the determination of an in-line price calls for a scrutiny of all pertinent sales activity, whether under permanent or under temporary certification. See *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438, 1442–1443 (1963). We therefore approve the Examiner's action in giving consideration to the temporarily certificated sales.

He further pointed out that, although contract prices "'should not be given primary consideration,'" such prices "do show economic trends in the area and are entitled to some weight" (Sinclair J.A. 225).

The court of appeals, in consolidated review proceedings, sustained the Commission's determination of the 16¢ in-line price in District No. 3 for sales antedating the policy statement. (The District No. 2 determination as to such sales was unchallenged.) However, it agreed with the distributors that the Com-

mission should have confined its inquiry into appropriate in-line prices for the later period to an examination of prices at which sales had been permanently certificated, and accordingly remanded the proceedings to the Commission for a redetermination of these in-line prices. Noting that the Court of Appeals for the Tenth Circuit, in the *Sunray* case (*infra*, this page), had recently approved the Commission's approach, the court below stated, "* * * we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case."[3] (Shell Pet. App. 33.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the District of Columbia Circuit held in this case that the Commission, in determining the maximum initial price at which natural gas may be sold in the interstate market, may consider only prices contained in existing permanent certificates authorizing such sales; it may not consider prices contained in contracts negotiated between the producers and pipeline purchasers of natural gas, or prices authorized by the Commission on a temporary, emergency basis. This ruling is in acknowledged conflict with the rationale of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, which upheld the Commission's in-line price—also involving sales in the Texas Gulf Coast producing areas—against the contentions accepted by the court below

[3] The court also concluded that the Commission had not adequately considered the issue of "public need" for the gas in question. We do not seek review of this latter aspect of the court's basis for remand.

in the instant case. Two distributors have filed petitions for certiorari challenging the ruling of the Tenth Circuit (*United Gas Improvement Co.* v. *Sunray DX Oil Co.*, No. 1134, this Term; *Brooklyn Union Gas Co.* v. *Federal Power Commission*, No. 1135, this Term), and we have filed a memorandum with the Court in those cases expressing our acquiescence in the granting of the petitions. For the same reasons, we urge that the Court review the judgment here as well.

We do not agree with petitioner Shell (No. 1328), however, that it is necessary to consolidate the present case with *Sunray* for briefing and argument in this Court. The Court's normal practice, where a petition raises the same issue involved in a pending case, is to defer action on the petition until the pending case is decided and then dispose of the petition summarily in conformity with its decision. We see no persuasive reason for departing from this practice in the present case—especially since this may be but the first of several additional petitions raising the *Sunray* issue that may soon be before the Court. See *Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10, Nos. 7912 *et seq.*, decided March 9, 1967 (Pet. No. 1328, App. B); *Continental Oil Co.* v. *Federal Power Commission*, C.A. 5, Nos. 23188 *et seq.*, awaiting decision after argument. In addition, we point out that *Sunray* involves an additional issue of importance—relating to the Commission's refund powers—not presented here.

CONCLUSION

The petition for a writ of certiorari should be held to abide the Court's final disposition of the petitions in Nos. 1134 and 1135.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
PETER H. SCHIFF,
Acting Solicitor,
JOEL YOHALEM,
Attorney,
Federal Power Commission.

MAY 1967.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1966

No. 19796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

SKELLY OIL COMPANY, SUN OIL COMPANY, CALLERY PROPERTIES, INC., SHELL OIL COMPANY, PAN AMERICAN PETROLEUM CORPORATION, SUPERIOR OIL COMPANY, HUMBLE OIL & REFINING COMPANY, W. S. KILROY, ET AL., AND KILROY PROPERTIES, INC., H. L. HAWKINS & H. L. HAWKINS, JR., PLACID OIL COMPANY, ET AL., INTERVENORS

No. 19,800

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MONSANTO COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY, SHELL OIL COMPANY, H. D. BRUNS & MPS PRODUCTION COMPANY, CONTINENTAL OIL COMPANY, LAMAR HUNT, INTERVENORS

In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on February 7, 1967.

OPINIONS BELOW

The opinion of the court of appeals (Shell Pet. App. A, pp. 13–43)[1] is not yet reported. The opinions and orders of the Federal Power Commission (Hawkins J.A. 277–308; Sinclair J.A. 215–241)[2] are re-

[1] "Shell Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Shell Oil Company in No. 1328, this Term.

[2] The decision below involved two Commission orders based upon separate administrative records, the revelant portions of

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ported at 34 F.P.C. 897 and 930, and its opinions on rehearing (Hawkins J.A. 315–320; Sinclair J.A. 247–253) at 34 F.P.C. 1330 and 1357.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1967 (App., *infra*, pp. 9–11). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Commission issued a number of permanent certificates of public convenience and necessity authorizing the sale of natural gas in the interstate market at prices it found to be "in line" within the meaning of *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*"CATCO"*). In determining the "in line" price, the Commission relied principally on prices at which similar sales had been permanently certificated. Its reliance on such prices is not challenged. But the Commission also took into consideration contract prices for similar sales and prices at which similar sales had been authorized on a temporary basis. The question presented is whether the Commission erred in giving weight to such prices.

STATUTE INVOLVED

The statute involved is Section 7 of the Natural Gas

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which were reproduced in separate joint appendices. "Hawkins J.A." relates to the order issued in *H. L. Hawkins and H. L. Hawkins, Jr.*, 34 F.P.C. 897, reviewed in C.A. D.C. Nos. 19796 and 19957. "Sinclair J.A." relates to the order issued in *Sinclair Oil & Gas Co.*, 34 F.P.C. 930, reviewed in C.A. D.C. Nos. 19800, 19919, and 19941.

Act, June 21, 1938, 52 Stat. 821, 824, as amended, 15 U.S.C. 717f. The pertinent portions of Section 7 are printed at Shell Pet. 2–3.

STATEMENT

In two parallel proceedings under Section 7 of the Natural Gas Act, the Commission issued permanent certificates for numerous sales made by independent natural gas producers in two pricing districts (No. 2 and No. 3) in the Texas Gulf Coast area. In each of the proceedings, the principal controversy concerned the initial ("in line") price at which the gas in question could be sold, pending the establishment of just and reasonable rates under Sections 4 and 5 of the Act.

The producers urged outright acceptance of the prices specified in their contracts with the pipeline purchasers—prices that ranged as high as 20¢ per Mcf (Sinclair J.A. 54–60; Hawkins J.A. 92–98). In support, the producers offered a variety of cost evidence, all of which, however, was excluded by the two hearing examiners and by the Commission. See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

A number of distributors and the Public Service Commission of New York argued for continuation of the original in-line ceilings of 15¢ per Mcf in District No. 2 and 16¢ in District No. 3, which the Commission had established on the basis of sales made prior to September 28, 1960, the date of its Statement of General Policy No. 61–1 (see p. 4, *infra*). The distributors' position was that the original in-line ceilings could not be increased.

No. 19919

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

LAMAR HUNT, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY, INTERVENORS

No. 19941

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 19957

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

[Filed Feb. 7, 1967]

On Petitions to Review Order of the Federal Power Commission.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Tamm, Circuit Judge.

JUDGMENT

These cases came on to be heard on the record from the Federal Power Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Power Commission on review in these cases is set aside, and these cases are remanded to the Federal Power Commission for further proceedings consistent with the opinion of this court.

Per Chief Judge BAZELON.

Dated February 7, 1967.

Senior Circuit Judge Wilbur K. Miller dissents.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 196~~8~~

No. ~~1463~~ 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and LONG ISLAND LIGHTING COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

THE SUPERIOR OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and LONG ISLAND LIGHTING COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Superior Oil Company herewith petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Nos. 19796, et al., on February 7, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F. 2d 816 (1967). Said opinion is also set forth in full in the Petition for Writ of Certiorari of Shell Oil Company (Appendix A, pages 13-43) assigned case No. 1328 in this October Term 1966. It also appears in Appendix B, pages 1a-30a of the Petition for Writ of Certiorari of Skelly Oil Company, et al., assigned case No. 1371, October Term 1966. Such Appendices are incorporated herein. The opinion and order of the Federal Power Commission [1] (Hawkins Appendix 277-309)[2] are reported at 34 FPC 897 (1965) and the Commission opinion on rehearing is reported at 34 FPC 1330 (Hawkins Appendix 315-321).

JURISDICTION

The judgment of the Court of Appeals in Nos. 19796, 19800, 19919, 19941 and 19957, consolidated by the Court below, was entered on February 7, 1967. An application for an extension of time in which to file this Petition of Writ of Certiorari was granted by Chief Justice Earl Warren extending the time for filing to and including June 8, 1967. This Petition is therefore timely filed and the jurisdiction of this Court

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[1] H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al., Docket Nos. G-18077, et al., Opinion 475.

[2] No. 19796 *Public Service Commission of the State of New York* v. *F.P.C.*

No. 19800 *Public Service Commission of the State of New York* v. *F.P.C.*

No. 19919 *Long Island Lighting Company* v. *F.P.C.*

No. 19941 *Continental Oil Company* v. *F.P.C.*

No. 19957 *The Superior Oil Company* v. *F.P.C.*

is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) 52 Stat. 831 (1938).

QUESTIONS PRESENTED

The Court below recognized that the concept of an "in-line" price is an artificial one created by this Court in *Atlantic Refining Company* v. *Public Service Commission of New York* (CATCO), 360 U.S. 378 (1959) and subsequent related interpretive decisions of the Commission and courts of appeal. The Commission below issued a number of permanent certificates of public convenience and necessity for the sale of natural gas at a price which it believed to be "in-line" within the meaning of *CATCO.* The Commission in such determination of the "in-line" price relied primarily on previously issued permanently certificated sales. The Commission also expressly took into consideration, but to a lesser degree, the contract and temporary certificate prices of comparable sales in arriving at its "in-line" price determination. However, the District of Columbia Circuit reversed the Commission and held that, where permanently certificated prices are available, only selected past permanent certificate prices may be relied upon for a Commission determination of an in-line price since these were the only prices over which the Commission had exercised careful control. It further held that the selected permanent prices might be relied upon even though certificated under standards later changed by the courts and there need not be in the proceeding below a reexamination of such prices at this time. Finally, the Court held that the Commission may exercise its discretion and ignore or discount, again without any reexamination, certain permanent certificate prices on the bare statement that such per-

manent sales would have been set aside under current judicial standards but for a procedural defect in the seeking of judicial review.

Questions presented are:

1. Is the Commission, in establishing the several "in-line" prices, obligated to disregard current conditions in the areas which might affect the price levels, when such current conditions are reflected by certain high-priced final permanent certificates, temporary certificate prices, contract prices and the Commission's price guidelines promulgated in its Statement of General Policy 61-1?

2. Does the Commission have discretion to determine an "in-line" price after elimination of certain final permanently certificated prices and rely entirely upon prices in those final permanent certificates remaining *without reexamining either the prices eliminated or those relied upon by the same standards*?

3. Does the Commission have the discretion to determine an "in-line" price in this proceeding on the basis of a weighted average price which includes all permanent certificates below 14 cents per Mcf when in prior proceedings the weighted average price used to determine the "in-line" price was based only on permanent certificate prices at or above 14 cents per Mcf?

4. Is it a requirement of producer applicants, or even the Federal Power Commission itself, to show in a Section 7 proceeding that the gas to be sold will (a) not eventually be used by consumers in an economically inferior way, (b) not be wasted through an oversupply situation and (c) be needed by the public?

STATUTE INVOLVED

The statute involved is Section 7 of the Natural Gas Act, June 21, 1938, 52 Stat. 821-833, as amended. 15 U.S.C. 717-717w. Sections 7(c) and 7(e), 15 U.S.C. 717f(c) and (e) are printed at pages 2 and 3 of Shell's Petition of Writ of Certiorari No. 1328 this Term and incorporated herein.

STATEMENT

The instant proceedings in the Court below involved separate proceedings before the Commission under Section 7 of the Natural Gas Act.[3] The Commission issued conditioned permanent certificates for numerous sales by independent natural gas producers for the separate pricing districts involved. Texas Railroad Commission District No. 2 on the Texas Gulf Coast is involved in the *Sinclair* proceeding and Texas Railroad Commission District No. 3, also on the Texas Gulf Coast, is involved in the *Hawkins* proceeding. Petitioner in the *Hawkins* proceeding contended that its contract price of 17.5 cents per Mcf was "in-line" when considered with the line of prices permanently certificated in other sales in District No. 3 reasonably contemporaneous in time and otherwise comparable to Petitioner's interstate sale.

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[3] The decision of the D. C. Circuit below involved two Commission orders based upon separate administrative records, the relative parts of which were reproduced in separate joint appendices. H. L. Hawkins and H. L. Hawkins, Jr., 34 FPC 897, Opinion No. 475 reviewed in CADC Nos. 19796 and 19957 is referred to as "Hawkins Appendix —." Similarly, Sinclair Oil and Gas Co., 34 FPC 930, Commission Opinion 476 reviewed in CADC No. 19800, 19919 and 19941 will be referred to as "Sinclair Appendix —." Copies of the record have been previously filed by Shell Oil Co. in No. 1328.

For District No. 3, the Commission determined that the "in-line" price was 16 cents per Mcf for sales prior to September 28, 1960 and 17 cents per Mcf subsequent to that date. For District No. 2, the *Sinclair* proceeding, the Commission determined that the "in-line" price to be 15 cents per Mcf for sales prior to September 28, 1960 and 16 cents per Mcf subsequent to that date. The Commission determinations were based on a record which included a contract price study of all temporary and permanent certificate sales made in this area since 1954, intrastate market studies and testimony as to the impact of the Statement of General Policy 61-1 on gas prices in this area. Various producers also offered other cost and economic studies to support their contract prices stated in the applications to the Commission but such testimony was excluded by the Commission under the precedent of the *Skelly Oil Company* case, Opinion 362, 28 FPC 401. Such exclusionary ruling received this Court's approval in *U.G.I.* v. *Callery Properties Inc.*, 382 U.S. 223 (1965).

The "in-line" price of only 16 cents per Mcf for District No. 3 for the period prior to the issuance of Statement of General Policy was based in large part on a weighted average price determination which excluded some nine permanently certificated sales, no longer subject to court review, at a 20 cent price level which the Commission stated would admittedly "have a strong effect on the weighted average price of 15.16 cents per Mcf." However, the Commission, with the Court below affirming, stated that such prices should be discounted as was done in Texaco Seaboard[4] be-

[4] Texaco Seaboard, Opinion 383, 29 FPC 593 (1963). No court review was sought due to settlement between the parties.

cause six of the nine sales were involved in *Trunkline Gas Company,* et al., 21 FPC 704 (1959) in which New York's Petition for Review was dismissed by the Court of Appeals because not timely filed. Shell Petition 1328, Appendix A, page 37; Skelly Petition 1371, Appendix B, pages 27a-28a. The Court below, concurring in the elimination of the nine 20 cent permanent prices from the determination of the price line, in addition, rejected the argument of the New York Public Service Commission that certain pre-Policy Statement "in-line" prices in District No. 3 were tainted by similar prices permanently certificated in the 1956-57 period and as such *CATCO* would consider such prices to be incorrectly certificated and not useable in an "in-line" price determination. The Court justified such Commission discretion in considering these 1956-57 prices by pointing out that although it is sometimes wise to reexamine certificated prices, any such requirement would render hearings under Section 7 without end. Shell Petition, Appendix A, page 26; Skelly Appendix B, page 27a. The Court erroneously held that while the Commission is not required to reexamine certificated prices, it is permitted so to do and may ignore such prices if it has good reason to do so. Under the guise of Commission discretion, the Court not only affirmed the Commission's inclusion of the 1956-57 permanent certificate prices attacked by the New York Public Service Commission and other non-comparable 14¢ permanent certificates in the price line determination but also approved the discounting, without quantification, of the nine 20 cent permanent certificate sales on the raw allegation that these particular sales would have been set aside if judicial review had been timely sought. The Court held that such

a statement was an adequate ground without the requirement of any reexamination for such disregard and discounting in the determination of the weighted average price.

Eastern distributors have selectively intervened in certificate proceedings where the contract price level or the price stated in the producer application was above the level deemed acceptable to them. By such tactic, the obtaining of a permanent certificate by an abridged proceeding was denied and any gas flowing under a temporary certificate pending a full hearing on the application was alleged by the distributors to be "suspect."[5] The Commission, in order to determine the present or future public convenience and necessity price for the instant certificates, had attempted to reflect in said multiple prices the current conditions of the industry as required by the 9th Circuit decision in *U.G.I.* v. *F.P.C., supra.* The Commission, in its analysis, considered not only the improperly selected permanent certificate prices but attributed some weight, although not primary consideration, to contract prices as well as prices under temporary certificates since in their opinion they showed economic trends in the area (Hawkins Appendix 281-285, 34 FPC 900-902). The Court held that the Commission's guideline price levels should be given no weight whatsoever in determining the "in-line" price. Further, prices under temporary certificates and contract prices should not be used because they are suspect and are subject to change at a later date, Shell Petition No. 1328, Appendix A, pages 32-33; Skelly Petition No. 1371, Appendix B, pages 22a-23a.

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[5] *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9CCA 1960).

The Court also held that the Commission opinion was in error on the question of the public need for gas. The Court held the Commission must consider market demand for the gas, as well as considerations of conservation and prevention of waste. The Commission was held to be obligated to consider reasons why there is or is not a public need for the gas and such decision must be made "before it grants a permanent certificate to a producer."[6] If the end use of such sale to a consumer will be, in the Commission's view, economically inferior, then the sale should not be certificated. The Commission, the Court below held, if it is to properly perform such functions, must consider "all alternative uses." Shell Petition No. 1328, Appendix A, pages 20-23; Skelly Petition No. 1371, pages 10a-13a.

REASONS FOR GRANTING THE WRIT

This case directly involves the proper method and procedure to be employed in the determination of an "in-line" price. It is of paramount importance to future Commission determinations under the Natural Gas Act and to all independent producers of gas subject to said Act. The acknowledged "artificiality" of the "in-line" pricing concept as announced by this Court in *CATCO, supra,* when considered with the subsequent decision of this Court in *U.G.I.* v. *Callery Properties, Inc.,* et al., 382 U.S. 223 (1965), which held that the Commission may properly determine and condition a certificate application to the "in-line" price without consideration of any other evidence than field price studies, makes clear the overwhelming sig-

[6] Shell Petition No. 1328, Appendix A, pages 23, 24; Skelly Petition No. 1371, Appendix B, page 13a.

nificance of a proper and uniform method for the determination of the "in-line" price to the gas-producing industry.

The effect of the Commission decision and its affirmance by the Court below is to give the Commission unbridled discretion to include or exclude prices which it considers in the determination of an "in-line" price on the mere naked assertion, unsupported by reason or fact, that the price result previously reached in a permanent certificate proceeding would not be the same on current reconsideration. This is done without any examination of the facts or circumstances in the prior record. Inconsistently, the Court below in the same proceeding affirmed the Commission discretion to consider and rely on other prices, also permanently certificated and no longer subject to review, again without considering the facts and circumstances in those records. The Commission on one hand says that one set of permanent certificate prices is wrong and should be ignored or discounted and then in the next paragraph states that other groups of permanent certificate prices should be fully considered without the Commission supplying any objective reason for their inclusion or exclusion. If final permanent certificate prices are to be properly ignored and such techniques affirmed by the courts on review, it must be a requisite that the Commission show why the prices relied on in the price line determination are not similarly subject to the same infirmity.

The Natural Gas Act does not delegate to the Commission unlimited powers to select prices it believes to be proper for given periods of time without further legal substantiation or factual reasons developed on

the record. It is not acceptable for the Commission to state that it has "considered" or "given some weight" and then include or exclude such certificated prices. The approval by this Court of such Commission techniques on judicial review affirming such techniques allows the Commission to make a mockery of the Natural Gas Act.

The Court of Appeals decision below is in conflict with the Court of Appeals decision of the 10th Circuit in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F. 2d 181 (10CCA 1966). That Court held that the Commission has the power and obligation to consider current conditions in the industry by giving some effect to contract prices, temporary certificate prices, and the impact of the Statement of General Policy. The Commission should obtain a balance between the interests of consumer and producer and can do so by looking to prices in temporary and permanent certificates which reflect current conditions in the market. The very careful review by the Commission in issuing temporary certificates with price conditions attached, as well as the full Section 7 hearings, bears out the Commission effort to comply with the U.G.I. Ninth Circuit case, as well as the *CATCO* and *Callery* Supreme Court decisions. The Tenth Circuit recognized the Commission discretion to look at factors other than its own past permanent certificate prices in determining a price line that would reflect changing current conditions in the area. The approval of this Commission technique by the Tenth Circuit is contrary to the D. C. Circuit holding that effectively wipes out Section 7 of the Natural Gas Act once an "in-line" price is determined for a particular area.

The refusal by the Court below to allow the Commission to consider temporary certificate prices, all permanent certificate prices now final, and contract prices, effectively rolls back prices to levels in effect in the late 1950's which have no current relevancy to gas being delivered under applications in the mid and late 1960's. Such a court holding abdicates the certificate pricing function to the distribution companies. The use of the suspect price doctrine and the active intervention of distributors creates "in-line" prices at such low levels that the Supreme Court decision in the *CATCO* and *Callery* cases is frustrated.[7]

Further, the decision of the Court below is also in conflict with the May 24, 1967 decision of the U. S. Court of Appeals for the Fifth Circuit[8] wherein the Court upheld the Commission technique for determining the "in-line" price for Texas Railroad District No. 4, including consideration of prices issued under temporary certificates. That Court stated that prices under temporary certificates do reflect current conditions and justify advancing the "in-line" price for the period prior to the Statement of General Policy to a higher level for the period subsequent to the Statement of General Policy:

> ". . . we align ourselves with the Tenth Circuit's Sunray DX and the Ninth Circuit's holding that '. . . the 'line' referred to in Catco may properly be referenced to relevant existing producer prices

[7] Petitions for certiorari challenging the ruling of the Tenth Circuit have been filed this Term by several distribution companies (*U.G.I.* v. *Sunray DX*, No. 1134 this Term, and *Brooklyn Union Gas Company* v. *F.P.C.*, No. 1134).

[8] *Continental Oil Company, et al.* v. *F.P.C., et al.*, Nos. 23188, et al., decided May 24, 1967, —— F. 2d —— (5 CCA 1967).

> under which substantive amounts of natural gas move in interstate commerce . . .' U.G.I. v. Federal Power Commission, 9 Cir., 1960, 283 F. 2d 817." at page 30 of the slip opinion.

The D. C. Circuit decision, then, is in conflict, not only with the Tenth Circuit but also the Fifth Circuit, as to the proper ingredients of an "in-line" price determination by the Commission and the necessary record that justifies a price line shift in the "in-line" price.

The Public Service Commission of the State of New York on review was successful in having the D. C. Circuit reverse the Commission on the issue of the producers' obligation to show a public need for the gas *before* permanent certification of the sale to an interstate pipeline. The Court's holding below that the Commission in processing a producer's application must determine whether or not the gas will be used in an economically inferior way and that it must consider all alternative uses is in direct conflict with the Fifth Circuit decision referred to above.[9] The Fifth Circuit rejected the distributor argument on the issue of public need. The Fifth Circuit held that the tremendous number of issues and evidence required to make such a finding was not consistent with the *U.G.I.* v. *Callery* Supreme Court decision that restricted narrowly the evidence necessary and proper for a determination of the "in-line" price. Further, the Fifth Circuit held, contrary to the D. C. Circuit, that the determination of the need issue in a producer's Section 7 proceeding constituted a collateral attack on a pipeline certificate case, as well as unduly enlarged the

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[9] *Continental Oil Co., et al.* v. *F.P.C., et al., supra.*

scope of the proceeding because of the necessary intervention of pipelines in the producer's case:

> "To force a general consideration of need in Section 7 proceedings would force consideration of that type of market evidence whose exclusion *Callery* specifically sanctioned on the price issue. *California Oil Company, Western Division* v. *Federal Power Commission,* 10 Cir., 1963, 315 F. 2d 652; *Texaco, Inc.* v. *Federal Power Commission,* 5 Cir., 1961, 290 F. 2d 149." at page 31 of the slip opinion.

Such holding, then, by the Fifth Circuit is directly contrary to the D. C. Circuit below and also requires this Court's resolution.

CONCLUSION

For the reasons detailed above and the presence of a conflict between the Court below and the supporting Fifth and Tenth Circuit decisions on the issue of the proper determination of the "in-line" price and the issue of in what proceeding and how the public need for gas is shown, the resolution of this Court is required.

Respectfully submitted,

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June 8, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1133

FEDERAL POWER COMMISSION,
Petitioner,

v.

SUNRAY DX OIL COMPANY, *et al.*,
Respondents.

No. 1134

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, *et al.*,
Respondents.

No. 1135

THE BROOKLYN UNION GAS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION, UNION PRODUCING COMPANY, EDWIN L. COX, AND SOHIO PETROLEUM COMPANY

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Tenth Circuit are reported at 370 F. 2d 181 and are reprinted as Appendix A to the Petition filed

by the Solicitor General on behalf of the Federal Power Commission (Commission) in No. 1133. The opinion and order of the Federal Power Commission is reported at 31 F.P.C. 623 and its opinion on rehearing at 31 F.P.C. 1315.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petitions.

Questions Presented[1]

1. May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, in the exercise of its expertise and pursuant to established policies, it determined both at the time of issuance of such certificate and upon subsequent reconsideration that no refund liability should be imposed?

2. Whether the Commission properly exercised its discretion in refusing to base its "in-line" price determination upon evidence relating solely to *de minimis* volumes of gas moving in interstate commerce?

3. Whether there is substantial evidence in the record to support the "in-line" price determined by the Commission, which it employed as a condition to the grant of permanent certificates to reduce the contract prices proposed by the producer certificate applicants?

Statute and Regulations Involved

The pertinent provisions of the Natural Gas Act (52 Stat. 821-833, as amended, 15 U.S.C. § 717-717w) are set forth in the Petitions.

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[1] Question No. 1 is raised by the Commission in No. 1133 and also by The United Gas Improvement Company in No. 1134 and The Brooklyn Union Gas Company, *et al.* in No. 1135 (distributors). Question Nos. 2 and 3 are raised only by the distributors.

The Commission's *Statement of General Policy No. 61-1*, 18 CFR 2.56(a), 24 F.P.C. 818 (1960) *(Policy Statement)*, established, *inter alia*, an initial rate ceiling of 18¢ per Mcf (thousand cubic feet) for Texas Railroad Commission District No. 4, the area in which the gas involved was produced. The *Policy Statement* provided in pertinent part as follows:

> "This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.
>
> * * *
>
> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. . . .
>
> * * *
>
> "These price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level. . . .
>
> "Where a proposed price exceeds the indicated rate level and is therefore conditioned or suspended we will, in determining whether the higher price is justified,

not necessarily consider only the financial requirements of the individual producer proposing the price but will consider all of the above elements relevant to the industry generally in the area concerned. Similar evidence will also be required from purchasers or their customers who object to any of the price levels or any specific price. . . ."

The *Fifth Amendment to Statement of General Policy No. 61-1,* 28 F.P.C. 441 (1962), by which the Commission promulgated a 16¢ initial guideline price in the subject pricing area for contracts executed after August 30, 1962, provided in part that:

". . . We have carefully re-examined the appropriate level of initial ceilings in this district in light of present conditions in the area giving due consideration to the applicable court decisions and the factors set forth in our original statement of policy.[1]

"[1] We there stated that these 'included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available market for the gas.' "

Statement

This litigation involves the claimed abuse of discretion of the Commission in determining, after hearing, that certificates of public convenience and necessity should issue at an initial price no higher than 16¢ per Mcf to certain producers for sales of gas from fields in Texas Railroad Commission District No. 4. On September 28, 1960, subsequent to this Court's decision in *Atlantic Refining Company* v. *Public Service Commission of New York,* 360 U.S. 378 (1959) *(CATCO)* and concurrently with the institution of its first Area Rate Proceeding, the Commission, after an extensive review of all factual, economic, and cost evidence

available to it, issued its *Policy Statement*. Therein it advised interested parties that it was establishing certain guideline prices at which it intended to issue certificates of public convenience and necessity in the absence of contrary evidence that such prices were either too high or too low. All of the contracts at issue here were executed subsequent to the issuance of such *Policy Statement*, and it is undisputed that the producers relied upon the findings made by the Commission in its *Policy Statement* in entering into these contracts and in subsequently dedicating their gas to the interstate market.[2]

By separate orders, the Commission granted temporary certificates of public convenience and necessity authorizing these producers to commence the proposed sales prior to its acting on their applications for permanent certification. Certain of these temporary certificates specifically provided that amounts collected thereunder would be subject to possible refund. The temporary certificates placed in issue by distributors contained no refund condition. Thereafter, distributors filed a joint motion seeking, *inter alia*, the imposition of refund conditions upon all temporary certificates which contained no refund condition. The Commission, by its order of February 5, 1963, (J.A. 275-282) denied distributors' motion. The distributors did not seek judicial review of this order.

In its order consolidating for hearing these producers' applications for certificates of public convenience and necessity, the Commission provided (J.A. 199):

> "In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15 cent per Mcf price which we found

[2] See *e.g.*, J.A. 131-135; 155. Cross-examination of all producer witnesses was waived by distributors and the Commission Staff.

to be the in-line price as of September 28, 1960, the 16 cent price which is being adopted as the future area ceiling price for this area, or the 18 cent per Mcf price established on September 28, 1960."

Pursuant to this directive of the Commission, the producers prepared and proffered economic evidence (less than 400 pages in length, including exhibits) which conclusively supported the Commission's *Policy Statement* guideline price of 18¢ per Mcf. This evidence was summarily excluded by the Presiding Examiner on motion by the distributors, and this ruling was affirmed by the Commission. The evidence introduced by the Commission Staff included a comprehensive exhibit listing all relevant sales made in District No. 4 under jurisdictional contracts on file with the Commission. The exhibit disclosed, for the period for which the in-line price was being determined, that:

(1) The average initial price, weighted by volume, was *above* 17.176¢;

(2) 82% of the gas sold was at initial rates of 16¢ *and above;*

(3) 71% of the gas being sold was at initial rates of 17¢ *and above.*

Distributors did not introduce any evidence to support their contention that the subject rates should be certificated at initial prices lower than the Commission's *Policy Statement* guideline levels.

The Commission considered and weighed the record evidence, and found (J.A. 379) that, while it "points in the direction of a higher price," the 16¢ price which it adopted was "the lowest price at which substantial volumes of new gas were sold in interstate commerce" and noted that:

"Our decision herein draws the line substantially below the average going price for gas in the area and

> in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed. . . ."[2a]

The Commission also held that it could legally order retroactive refunds of amounts collected under temporary certificates containing no refund condition.

The Commission's 16¢ initial price determination was appealed by both the producers and distributors. The producers also appealed the Commission's finding that it could order refunds retroactively. The Court of Appeals affirmed the Commission's establishment of the 16¢ per Mcf ceiling price line and held the Commission could not legally order refunds retroactively of amounts collected under temporary certificates containing no refund condition.

Reasons The Writs Should Be Denied

Both the Commission and the distributors raise the legal issue of whether retroactive refunds can be ordered of amounts collected under temporary certificates containing no refund condition. The reasons why this Court should not review that issue are set forth in the Briefs in Opposition filed by Respondents Sun Oil Company and Lamar Hunt which these producers adopt on this point in order to avoid unnecessary duplication. In addition, the Petitions filed by distributors (Nos. 1134 and 1135) attack the Commission's factual finding, based upon the record below, that permanent certificates should be issued at initial rates no higher than 16¢. This attack raises only the question of whether the Commission's price line finding was based on substantial evidence. It is to this issue that our argument is directed.

[2a] All emphasis supplied unless otherwise indicated.

1. There is no important question of Federal Law raised by the distributors' Petitions with respect to the Commission's initial price determinations.

The Commission's in-line pricing technique was, as all parties admit, an interim technique designed to expedite the determination of producer initial certificate prices prior to the establishment of a just and reasonable rate. Hearings have concluded in the area rate proceeding initiated to establish the just and reasonable rate for gas sold from the subject pricing area. Moreover, there are no in-line proceedings for sales from this area pending before the Commission. In fact, there are no pending in-line proceedings from any area except for one involving a few companies in Oklahoma in which the majority of the parties have already settled. The interim in-line methodology utilized herein is no longer a viable Commission procedure. Therefore, there are no legal principles presented by this case which will significantly affect the Commission's future administration of the Natural Gas Act.

Distributors not only are asking this Court to review a Commission procedure which is of only historical importance, but they have chosen a case in which the Commission was faced with a unique factual situation in applying this procedure. This Court in *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223 at 227 (1965) *(Callery)* emphasized the importance of establishing the price line at a level where " . . . *substantial* amounts of gas have been certificated . . ." Unlike *Callery*, however, there were not *substantial* amounts of gas permanently certificated from this pricing area under other contemporaneous certificates. Moreover, the Commission found that the permanent certificates which had been issued in the relevant time period were for only a ". . . few isolated and inherently non-

representative sales. . . ." (J.A. 372) The question to be resolved by the Commission here was thus the narrow one, not raised in other in-line proceedings, of how an interim in-line price should be established in the absence, as a point of reference, of contemporaneously issued permanent certificates encompassing substantial volumes of gas. This Court's review of the appropriate application upon these unusual facts of an interim procedure which is no longer being utilized is manifestly not required.

2. The price level found by the Commission and approved by the Court of Appeals is not "excessive."

The evidence that these same distributors introduced in the *Texas Gulf Coast Area Rate Proceeding* encompassing the subject pricing area established that the 15¢ price level for which they are here contending is far below the cost level for gas of this vintage. Distributors' witness testified in such proceeding that the average current cost of gas was 16.44¢ per Mcf.[3] The Commission Staff in the same proceeding presented cost studies showing that the average cost of gas of this vintage was 16.8¢ per Mcf. Moreover, and perhaps more importantly, the Commission itself, in its Opinion and Order establishing area rates for sales from the Permian Basin found the average national current cost of gas to be 16.43¢ per Mcf. (34 F.P.C. at 192)

Although we believe these cost estimates developed by the distributors, the Commission Staff, and the Commission are lower than actual current cost levels, it is significant that their presentations have clearly demonstrated that the Commission's 16¢ in-line determination in this proceeding,

[3] Distributors' witnesses have consistently testified in the area rate proceedings that these cost level were experienced by the industry commencing in the late 1950's.

which they are here attacking is too high, has in fact erred on the low side. Equally applicable to these facts is the conclusion expressed by this Court in its Second *Phillips* decision that:

> ". . . The record before us does not paint a picture of the public interest sacrificed on the altar of private profit." (*Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 312 (1963))

An in-line price of 16¢ per Mcf, which is (1) *below* the cost level of gas of recent vintage as developed by both the distributors and the Commission Staff in the relevant area rate proceeding and (2) *below* the national average of the "recent cost of finding and producing an Mcf of gas" as found by the Commission in its only completed area rate proceeding, should not be slashed ever further as urged by distributors.

3. The Commission appropriately revised its prior in-line determination to reflect current conditions in the industry.

There is no legal precedent for the distributors' position that, as a matter of law, the Commission was required to freeze the initial prices at which permanent certificates are issued for an interim period lasting at least ten years, while it attempts to determine the appropriate just and reasonable rates. In the instant proceedings, the Commission revealed the fallacy of the distributors' reasoning:

> "The interveners urge, and the examiner holds, that if 15 cents is 'in-line' for the past and our task is to 'hold the line' the price should remain at 15 cents for any subsequent period. This reasoning ignores the crucial fact that 'the key element in our in-line determination is the time at which the contract in issue was executed.'[32] We do not believe that our task of assur-

> ing adequate supplies of gas in interstate commerce at the lowest reasonable price can be adequately discharged by an approach which requires us to shut our eyes to the evidence presented in later proceedings. *A rule of law that would deprive producers of any opportunity to show that the initial prices in the 1950's did not suffice for the 1960's or, conversely, that would deprive consumer groups of an opportunity to show a decline in the price level, is not fair to the producers or in the long-term interest of consumers.* Nor is such a rule even suggested by the decisions of the courts." (footnote omitted; J.A. 372)

This Court in its review of the Commission's in-line pricing technique in *United Gas Improvement Company, et al.* v. *Callery Propertes, Inc.,* 382 U.S. 223 (1965) held at 227:

> ". . . Consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market *under other contemporaneous certificates,* no longer subject to judicial review or in any way 'suspect. . . .'"

Decisions in the Court of Appeals in Circuits other than the one considering this case have consistently held current conditions to be relevant in establishing the price line. The Court of Appeals for the Ninth Circuit has specifically rejected an argument by one of the distributors herein strikingly similar to that advanced by it and the other distributors in the instant proceeding. The Ninth Circuit stated:

> "As previously indicated, *the price line is intended to reflect current conditions in the industry.* Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. *The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in*

fact, require a rollback to prices having no current relevancy.[5]"[4] (footnote omitted)

The Commission decision in the instant case to revise its prior in-line determination to reflect current conditions in the industry was consistent with the above precedents and fully supported by the record. Moreover, its consideration, *inter alia,* of its *Policy Statement* guideline levels and trends in temporary certificate initial price was clearly proper. The *Policy Statement* guideline level for this area was based on the Commission's "experience gained after six years of regulation of independent producers" and "all relevant facts available" from "all decided and pending cases" was clearly a proper matter to weigh and consider.[5] Moreover, the Commission correctly found that producers directly relied upon the *Policy Statement* price levels in their contract negotiations in deciding whether to commit gas reserves to the interstate market. (J.A. 377-378) Temporary certificate applications are carefully reviewed by the Commission under established policies and regulations and, temporary certificates, if issued, only allow producers to collect rates at or below the current guideline level. Price, refund and rate increase moratorium conditions are frequently inserted. Moreover, orders issuing temporary

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[4] *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F.2d 817, 824 (CA9, 1960), certiorari denied *sub nom. Superior Oil Company* v. *United Gas Improvement Company,* 365 U.S. 879 (1961).

[5] The Commission does not contend that the *Policy Statement* price levels constitute a final binding determination on interested parties but only that as the product of Commission expertise they are entitled to be weighed along with other relevant factors. Of particular significance is the fact that the original *Policy Statement* guideline levels have been periodically revised by the Commission as a result of more current factors brought to their attention by distributors and other parties in various pending proceedings. In the subject pricing area the Commission by the *Fifth Amendment* to its *Policy Statement* revised its initial guideline level *prior* to its decision in this case.

certificates have been uniformly held to be reviewable by the courts, thereby giving parties opposed to the Commission's policies with respect to temporaries an avenue of protest.[6] Prices approved by the Commission in its consideration of the issuance of these certificates and the experience gained thereby cannot be fairly characterized as meaningless and irrelevant.[7]

Finally, distributors cannot justifiably complain of the quality of the evidence which the Commission and the courts have held is relevant in an in-line proceeding. The exclusionary rules of evidence applicable to in-line proceedings were originally proposed by distributors. Additional evidence showing industry economic and cost trends was proffered by the producers and excluded upon motion by distributors. Having excluded all evidence except that utilized by the Commission in its decision, distributors now maintain that this Court should hold in effect that the Commission must abdicate to them its responsibility to determine the appropriate initial price required by the public convenience and necessity. This is the inevitable result flowing from distributors' position that the Commission in making its in-line determination may not look to any evidence other than permanent certificates which are not

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[6] *Pure Oil Co.* v. *Federal Power Commission*, 292 F.2d 350 (7th Cir. 1961); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F.2d 404 (10th Cir. 1959).

[7] This proceeding also demonstrates the speciousness of the distributors' claim that the issuance of temporary certificates only benefits producers. If the Commission had not issued temporary certificates during this period, there would have been a delay of from one and one-half to three years before approximately 80% of all gas sold from the subject area under contracts executed during the relevant 23-month period commenced its journey to the interstate consumers. No party to this proceeding asserts that this substantial volume of gas was not in fact required to meet the expanding consumer needs at the time when it commenced to flow under temporary certificates.

being contested by distributors before the Commission or the courts. The Commission, in its opinion below, succinctly stated the result which would follow if the distributors' position were adopted:

> "It is not by chance that with the single above-noted exception the only permanent certificates granted during the period were at prices of 15 cents per Mcf or lower, because all applications for higher prices were opposed by some or all of the interveners herein. If these permanent certificates are to control, then the 'in-line' price for sales representing over seven times the minimal volumes of gas permanently certificated during this period is being determined, *not upon consideration of a hearing record, but by the unreviewable fiat of the interveners. . . .*" (J.A. 370-371)

It cannot be said that the Commission's decision to revise the price line it had set for the 1950's to reflect changing conditions in the 1960's was an abuse of discretion and unlawful.

4. There is no conflict between decisions.

Distributors erroneously represent that this case presents a clear conflict with the recent decision by the D. C. Circuit Court of Appeals in *Public Service Comm'n of the State of New York* v. *Federal Power Commission,* Nos. 19797, *et al.* (February 7, 1967), which is reprinted as Appendix C to the Petition in No. 1135. The D. C. Circuit Court of Appeals, however, clearly recognized that the unique factual situation in the instant proceedings was not present in the case before them and stated that the court in the instant case was faced with:

> ". . . a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated. . . . In our case there is a substantial vol-

ume moving under permanent certificates.[70] *We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.*" (Footnote omitted) (Petition in No. 1135, page 28a)

It is thus clear that the decision of the Court below affirming the method developed by the Commission for establishing an in-line price in the unique circumstances where no substantial volumes of gas were being sold under contemporaneously issued permanent certificates can have no effect upon the precedental value of the D. C. Circuit's decision involving entirely different Commission pricing areas and does not in any way lead to a lack of uniformity in the circuits.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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FILED
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JOHN F. DAVIS, CLE

In the

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. ~~1133~~, ~~1134~~, and ~~1135~~
60 61 & 62

FEDERAL POWER COMMISSION
THE UNITED GAS IMPROVEMENT COMPANY
BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO, INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY AND UNION PRODUCING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, LAMAR HUNT

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 1133, 1134, and 1135

FEDERAL POWER COMMISSION
THE UNITED GAS IMPROVEMENT COMPANY
BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO, INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY AND UNION PRODUCING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BREIF IN OPPOSITION FOR RESPONDENT, LAMAR HUNT

LAMAR HUNT, one of the Respondents in the captioned cases, files this, his Brief in Opposition and prays that the captioned Petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 9, 1966, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit and the dissenting opinion are reported in 370 F. 2d 181.

The opinion and order of the Federal Power Commission are reported at 31 FPC 623, and on rehearing, at 31 FPC 1315. The Commission's opinions are also included in the joint appendix of the record (herein referred to as J.A.) submitted to the Court of Appeals for the Tenth Circuit at pages 354-396 and 409-418.

JURISDICTION

The jurisdictional requisites are adequately set forth in each of the petitions filed herein.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. § 717-717w, are set forth in the petition filed in Case No. 1133 (FPC Pet. pp. 2-3). The Statement of General Policy No. 61-1, 18 C.F.R. 256(a), 24 FPC 818, is set forth in Appendix A of the Brief in Opposition, filed by Respondent, Sun Oil Company.

QUESTIONS PRESENTED

1. Pursuant to Section 7(e) of the Natural Gas Act, the Federal Power Commission (Commission) may issue temporary certificates of public convenience and necessity authorizing the immediate commencement and delivery of sales of natural gas pending hearing and determination on applications for permanent certificates. In so doing, the Commission is required in accordance with this Court's decision in *FPC v. Hunt*, 376 U.S. 515 (1964) to attach thereto such conditions, e.g. price reduction, refund, moratoria, as may be necessary to protect the consumers during the interim in which the temporary certificate is operative.

One issue presented by each of the subject petitions is: May the Commission, after having issued *unconditioned no-refund* temporary certificates, subsequently attach conditions to the permanent certificates requiring retroactive refunds of amounts collected during the pendency of the temporary certificate where the producer had no notice of any such refund obligation?

2. An additional question appears in the petition filed by the distributor interests in Nos. 1134 and 1135. Restated it is: In determining the "in-line" price, did the Commission abuse its administrative discretion by refusing to restrict its determination to permanently certificated sales representing only 1.39% of the gas sold?

STATEMENT

On March 23, 1964, the Federal Power Commission issued to the producers (Respondents) permanent certificates of public convenience and necessity authorizing sales at a 16¢ "in-line" price of natural gas produced from fields geographically located in Texas Railroad Commission District No. 4.[1] (J. A. 354-396). These sales had been earlier commenced at prices ranging from 16¢ to 18¢ per MCF pursuant to temporary certificates theretofore issued pending hearing and determination on permanent certification.

In granting these certificates, the Commission further asserted the power to order at some subsequent date refunds

[1] The Commission by *Statement of General Policy No. 61-1*, (Policy Statement), 24 FPC 818, divided for pricing purposes the Continental United States into twenty-three producing areas. The boundaries of one of those areas coincide with the boundaries designated by the Texas Railroad Commission as District No. 4.

of all or a portion of any amounts collected under the temporary certificates above the 16¢ price level.[2]

A review of the historical evolvement of the subject certificate applications in the light of the prevailing administrative policy is necessary to appreciate the significance of the Commission's action. Each of these temporary certificates was issued after September 28, 1960, the date of issuance of the Commission's *Statement of General Policy AR 61-1*, 18 C.F.R. 2.56, 24 FPC 818 (Policy Statement). Issued in conjunction with its precedent setting Phillips-on-remand decision[3], this Policy Statement purported to establish price standards which would serve as "a guidance for the Commission and interested parties as to whether proposed initial rates should be certificated without price condition and whether proposed rate changes should be accepted or suspended." 24 FPC 818. The initial price standard fixed therein for District 4, the area here in question, was 18¢ per MCF.

It was only two months after the issuance of this Policy Statement that Respondent, Lamar Hunt, sought certificate authority, including a temporary certificate, to initiate

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[2] The Commission has now exercised that reserved power by Opinion and Order issued July 27, 1966, *In Re Amerada Petroleum Corporation, et al*, Dkt. No. CI62-1544, *et al*, (Opinion No. 501). It has required refunds of a portion of amounts collected under the temporary certificate. By *per curiam* order in *Standard Oil Company of Texas v. Federal Power Commission*, ... F. 2d ....., No. 9289, March 27, 1967, the Tenth Circuit, based upon the decision here under review, has set aside the Commission's exercise of its asserted power.

[3] *In Re Phillips Petroleum Company*, 24 FPC 537, affirmed 303 F. 2d 380 (D.C. Cir. 1963), and 373 U.S. 294 (1964).

an interstate sale at a price of 16.5¢ per MCF. Uniquely, Hunt's sales contract with its pipeline purchaser provided that in the event Hunt did not receive promptly an unconditioned temporary certificate authorizing the sale as contracted, the gas would be sold exclusively in the intrastate market. Thus, there was reserved to Hunt the choice of an interstate or an intrastate market dependent upon the conditions, if any, that were attached to the temporary certificate authorizing the interstate sale.

On April 10, 1961, some five months after temporary authority was requested, the Commission tendered Hunt an *unconditioned no-refund* temporary certificate. Relying upon the unconditioned nature of the proffered temporary certificate and in view of the certificated price being well below the price standard of the Policy Statement, Hunt accepted the certificate and committed his gas to the interstate market.

Subsequently Hunt's sale, together with those of other Respondents, was consolidated for a hearing on the permanent certification. However, prior to the commencement of these consolidated hearings, in October of 1962, the distributor petitioners asked the Commission to impose refund conditions upon those temporary certificates which contained no refund condition (J.A. 225). The Commission emphatically denied this request stating that such would be contrary to the public interest and inconsistent with its obligation to act with such certainty as to allow the exercise of a choice by producers of whether to commit their gas to the

interstate market (J.A. 275-282). This order was not appealed.

After completion of hearings limited solely to the derivation of a so-called "in-line" price, the Commission issued the opinions here under review. Upon judicial review, sought by both the producers and distributor interests, the court below affirmed the Commission's price line determination and its permanent certification in accordance therewith. The Court, however, reversed the Commission's assertion of power to order retroactive refunds of amounts collected under and pursuant to unconditioned no-refund temporary certificates, holding that absent a specific refund condition, the Commission could not retroactively modify a validly issued temporary certificate.

Review of the Tenth Circuit's decision, insofar as it relates to the Commission's power to order retroactive refunds, is now sought by the Commission and distribution companies. In addition, the distributors contend that the court below erred in affirming the Commission's 16¢ "in-line" determination.

REASONS FOR DENYING THE WRIT

REFUND ISSUE:

Petitioners' collective argument on this issue is premised upon an erroneous construction of the Tenth Circuit's decison. Lifting the result out of its context, they argue that the Court's holding unduly restricts the Commission's power to protect the consumer during the period in which tempo-

rary certificates are operative. As such, they allege (1) that the court below was clearly wrong and inconsistent, at least in principle, with earlier decisions of this Court; and (2) that the decision presents a question of substantial importance in the administration of the Act and one on which the Circuits are divided. The Respondent submits the Petitioners are wrong not only in their broad construction of the Tenth Circuit's decision, but also in their allegations of error and importance. As such, the petitions should be denied for the following reasons:

(1) *The decision below is clearly correct.*

While Petitioners would characterize the issue as one relating to the Commission's conditioning powers in the issuance of permanent certificates, the essence of their argument is in reality an effort to strip all significance and validity from the Commission's issuance of temporary certificates. If Petitioners prevail, temporary certificates will become meaningless. The Commission could thus retroactively annul or amend any temporary certificate or modify any of the conditions imposed thereupon. It would even be free to withdraw the very conditions which may have induced the committal of gas to the interstate market. To impose upon an unwary natural gas company such hidden liabilities has been described by the court below in a related case as being "unconscionable", *Pan American v. Federal Power Commission,* F. 2d .....; (Nos. 7192, *et al,* March 9, 1967.)

Certainly Hunt does not deny that the consumers are entitled to protection during the pendency of temporary certificates. The Commission's authority and obligation to so

protect the consuming public during this interim was the very subject of this Court's decision in *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964). There the court made clear not only the broad authority vested in the Commission in the issuance of temporary certificates under Section 7(e), but also the importance and necessity of such authority being properly exercised. Speaking through Mr. Justice Clark, the court stated:

> "When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of §7. His natural gas must be certificated before it can move into interstate commerce. If he wishes to avoid the delay incident to a hearing for a permanent certificate he may apply for temporary authorization, which may be granted upon *ex parte* application. *In view of this, the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate.* In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued." (Emphasis added.) (376 U.S. at p. 523)

Thus, contrary to Petitioners' argument, the exercise of administrative discretion in conditioning or not conditioning temporary certificates does have meaning. Otherwise, why *must* the Commission have authority to condition a temporary certificate; why be concerned with avoiding *irreparable* injury? If the Commission can later, on permanent certification, retroactively modify lawful temporary certificates, then the temporary certificates are devoid of signifi-

cance. Petitioners' argument simply cannot be reconciled with *Hunt*.

Petitioners' reliance on *United Gas Improvement Co., et al v. Callery Properties, Inc.*, 382 U.S. 223 (1965) (Callery), is likewise misplaced. Admittedly, this Court there upheld refunds of amounts collected during the pendency of judicial review of permanent certificates which were ultimately set aside. However, the Commission's certificating action there never became final; the producers through judicial review were put on notice of possible modification of their certificates.

Here, in contrast, the producers had no such notice;[4] the Commission's initial certificating orders became final.[5] In

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[4] The Petitioners point to certain routine 'boiler plate' language contained in the temporary certificates having put the producers on notice of possible retroactive modification. It is noteworthy that virtually identical language is contained in the permanent certificates issued herein. Compare the temporary certificate, e.g. J.A. 194, with ordering paragraph K of the permanent certificate (J.A. 387). The latter provides:

> "Such grant is without prejudice to any filing or order which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants."

Certainly this language does not detract from the finality of the permanent certificate. Neither does similar language in the temporary certificate. As the court below found, the Commission is merely not binding itself to issue an identical permanent certificate of prospective effect after a hearing.

[5] While the reviewability of temporary certificates is well established, *Pure Oil v. FPC*, 292 F. 2d 350 (7th Cir., 1961); *Sunray v. FPC*, 270 F. 2d 404 (10th Cir., 1959), no review was sought of these temporary certificates. Their finality cannot be discredited, as Petitioners would attempt to do, on the basis of their being issued *ex parte*. The issuance of *ex parte* temporary certificates is a matter of public record and in practice has *always* been available for examination in the public reference room of the Commission. The Commission's own regulations, 18 C.F.R. 1.36 (c)(6) so require.

further contrast, the producers were given specific assurances by the Commission that their temporary certificates would remain unchanged during their operativeness. In October of 1962 certain distributors asked for the imposition of a specific refund condition. The Commission denied such request stating that modification of existing temporary certificates would not be in the public interest:

> "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon application with 'such certainty as to allow the exercise of choice upon (the producers') part.' *Sunray Mid-Continent Oil Company v. FPC*, 270 F. 2d 404. Equally important it would so denature the value of a commission authorization as to place any reliance upon our actions in this area in serious jeopardy." (J.A. 277)

Thus, in this instance the Commission not once, but twice, considered the possibility of imposing refund conditions, and both times decided against such action. Interestingly, this order denying the imposition of refund conditions was not appealed. The distributor Petitioners certainly cannot claim that they were precluded by lack of notice from appealing this Commission action.

While *Callery* is clearly distinguishable, it is noteworthy that this Court in *Callery* reaffirmed the principle that the Commission has no power to make reparation orders *(Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618). Yet, reparations are exactly what Petitioners are

here seeking, i.e., refunds collected under a lawful order which even now remains unchallenged and unimpeached.

Admittedly, in the exercise of its administrative discretion, the Commission may not always precisely predict the price that it will ultimately determine on permanent certificate hearing to be required by the public convenience and necessity. There may be instances in which the temporary certificate price may differ from the permanent certificate price. In some cases as in the Permian Basin Area, the permanent certificate price may be higher. The initial price standard established by the Commission's Policy Statement for that area was 16¢, and temporary certificates issued thereafter were conditioned to this price. However, permanent certificates were subsequently issued authorizing the same sales at 16.5¢ per MCF.[6] Certainly, according to Petitioners' argument, the producers in such circumstances were entitled to a modification of their temporary certificates and a retroactive payment of the difference in price. To so hold is to regard the Commission's issuance of temporary certificates as an exercise in futility which is clearly inconsistent with this Court's holdings in *Hunt* and *Callery*.

(2) *The issue presented is unique and not of sufficient importance to warrant intervention by this Court.*

Petitioners grossly exaggerate the importance of this issue, claiming that a large number of sales with potentially large refunds will turn on the same issue. In view of an alleged conflict with the Court of Appeals for the District of Columbia

[6] *In re Area Rate Proceeding 61-1*, 34 FPC 418 (1965).

in *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242, cert. denied, sub. nom., *Prado Oil & Gas Co. v. Federal Power Commission*, 377 U.S. 963 (Skelly), they urge prompt resolution by this Court.

It is undisputed that the issue relates to a limited number of contracts for a limited period. In fact, the entire "in-line" concept is an interim procedure. Even the Commission recognizes that the ruling below can be avoided in the future by inclusion of express refund conditions in new temporary certificates.[7] Thus, at most, the issue relates solely to a limited number of sales awaiting permanent certification for a past locked-in period.

The reference by the Petitioners to the large number of contracts[8] that will be controlled hereby is somewhat misleading. In the first place the numbers referred to are *extra*-record and are not subject to verification. However, a review of the Commission's work papers used to support its assertion, indicates that of the 567 pending temporary certificates, 91 contain specific refund conditions, and, therefore, would not be affected by the decision below. Of the remaining 476 temporaries which do not contain refund conditions, 403 were temporarily certificated at or below the applicable "in-line' price as previously determined by the Commission, and, therefore, have no potential refund liability. Thus, at best, even ignoring any special circumstances, only 73 contracts could possibly be affected or

[7] FPC Order No. 337, Dkt. R-316 has enunciated just such a policy for issuing future temporary certificates.

[8] This was originally referred to in Petitioners' brief as 579 contracts. The Commission now admits that the figure should have been 476 contracts.

controlled by the outcome of the decision below on this issue.

The reference to potential refunds under pending cases is likewise speculative. Most of these cases are still pending either before the Commission or the courts. In fact, the Commission has yet to be finally judicially upheld in its ordering specific retroactive refunds of amounts collected under unconditioned temporary certificates. Thus, recitation of what may ultimately be affected by the decision overstates the issue.

In view of the locked-in period involved, the limited duration of the "in-line" pricing procedure, and the steps taken by the Commission to preclude the issue from being raised in the future, Respondent submits that the question presented is not of sufficient importance to warrrant intervention and resolution by this Court. As earlier indicated, this issue was decisively dealt with in *Federal Power Commission v. Hunt*, *supra*, and a further consideration of the limited issues here presented would be in large measure a duplication of the previous consideration.

"IN-LINE" PRICE DETERMINATION:

The distributor Petitioners also question the Tenth Circuit's affirmance of the Commission's "in-line" price determination. Principally, they object to the Commission's consideration of temporary certificates, intrastate sales, and its Policy Statement in determining the prevailing price line. The Petitioners charge that the affirmance of this action by

the court below conflicts with the D.C. Circuit's decision in *Public Service Commission of New York v. FPC*, ... F. 2d .... (No. 19,796, February 7, 1967).

The Petitioners ignore the expertise to be accorded to an administrative agency in such matters. Unfortunately, the determination of an "in-line" price has not evolved into an exact science; therefore, in deriving an "in-line" price, certain administrative latitude has been permitted.

If specific standards theretofore used had been there applied, i.e., median prices, weighted average prices, etc., the price line would have been much higher. In fact, Respondents vigorously claimed in the court below that the Commission had erred on the low side in fixing a 16¢ price line.

A review of the facts before the Commission reveals ample support for the Commission's failure to adopt the extreme position now advanced by the distributors. Admittedly, the Commission looked beyond the permanently certificated sales for indeed they had no choice, since so few sales had been permanently certificated in the area. As the Commission noted:

> "Unlike the situation in *Skelly* there is no substantial volume of gas presently under permanent certification. Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the 'in-line' price amount to only 1.39 percent of the volumes for all sales shown and to no more than 2.05 percent of the sales permanently certificated in the District contained in the exhibit. * * * In our opinion it

> would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets." (J.A. 371)

In following this Court's directives in *CATCO*[9] and *Callery*, it was necessary for the Commission to determine the various prices at which substantial volumes of gas were being sold. In view of the limited number of permanently certificated sales, it was necessary for the Commission to consider temporarily certificated sales in order to base a decision on a substantial volume of gas. As the Commission recognized:

> "Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the 'in-line' level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed."

A much different situation existed in the *Hawkins-Sinclair* cases in which the D. C. Circuit in *Public Service Commission of New York, et al v. Federal Power Commission*, (Nos. 19797, February 7, 1967), reached a different result. There a substantial number of sales and volumes of gas were permanently certificated. While the distributor Petitioners may not recognize the distinction between the two cases, the D. C. Circuit did. Speaking for the court, Judge Bazelon, quoted so extensively by Petitioners to establish an

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[9] *Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378, (1959).

"irreconcilable" conflict, observed that the Tenth Circuit faced a different problem:

> "There, (referring to this case), only 1.39% of the gas sold in the area was permanently certificated. * * * In our case there is a substantial volume moving under permanent certificates. We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison." (Slip op. p. 22)

Furthermore, in view of the Commission's very candid admission that it selected the lowest segment of the range of "in-line" prices, whatever advantage the producers may have derived from the use of temporarily authorized sales was clearly offset. The concept of "the lowest segment of the range of 'in-line' price" is certainly inconsistent with this Court's *Callery* decision which described the "in-line" price as a device which will prevent gas from entering interstate commerce at prices higher than the existing levels. 382 U.S. at p. 227.

Here the Commission should have found Hunt's 16.5¢ price to be in-line; the weighted average price was above 17.178¢ per MCF (J.A. 374); over 82% of the gas is sold at 16¢ and above (J.A. 375); 71% of the gas was being sold at 17¢ and higher (J.A. 373). Thus, it is manifest that the Commission did not abuse its discretion in determining the price line by refusing to restrict itself to a de minimus number of permanently certificated sales.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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April 6, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 122 60

FEDERAL POWER COMMISSION, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. 123 61

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. 1262

THE BROOKLYN UNION GAS COMPANY, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR SUN OIL COMPANY, RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1133

FEDERAL POWER COMMISSION, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. 1134

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. 1135

THE BROOKLYN UNION GAS COMPANY, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR SUN OIL COMPANY, RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (FPC Pet., App. pp. 15-48) is reported at 370 F. 2d 181. The opinions of the Commission (J.A. 354-396, 409-418)[1] are reported at 31 FPC 623 and 1315.

[1] "J.A." references herein are to the joint appendix in the court of appeals, copies of which have been deposited with this Court by Petitioner in No. 1133.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1966 (FPC Pet., App. p. 83). The petitions for writs of certiorari were filed on March 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission had the power to impose refund liabilities retroactively upon amounts collected pursuant to lawful temporary certificate orders, which authorized certain sales of natural gas but contained no forewarning of the possibility of such imposition.

2. Whether the Federal Power Commission's assertion of such power at the time of permanent certification of these sales constituted an illegal contravention of its order in the proceeding below holding that a refund imposition "would be contrary to the public interest, as well as inequitable."

3. Whether there is substantial evidence to support the Federal Power Commission's determination of the "in-line" price, which it attached as a condition to permanent certification of the sales of natural gas involved.

STATUTE AND REGULATIONS

The pertinent provisions of the Natural Gas Act are set forth in the Commission's petition (FPC Pet., pp. 2-3). The Commission's Statement of General Policy No. 61-1 (24 FPC 818), and the Fifth Amendment thereto (28 FPC 441) are set forth in Appendix A, *infra,* pp. 1a-15a.

STATEMENT

The administrative proceedings below were initiated by the filing of separate applications for certificates of public convenience and necessity by Respondents[2] and others pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f. These applications proposed sales of natural gas produced in Texas Railroad Commission District No. 4 to various pipeline companies pursuant to individual contracts providing for initial prices ranging from 16 to 18 cents per Mcf. Each of these applications included the related gas sales contract which fully disclosed the terms upon which the gas was proposed to be sold.

Following the initiation of these administrative proceedings, the Commission granted temporary certificates of public convenience and necessity by separate orders[3] authorizing the producer Respondents to make

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[2] These included the applications of Sunray DX Oil Company, Sohio Petroleum Company, Texaco Inc., Gulf Oil Corporation, Sun Oil Company, Edwin L. Cox, Lamar Hunt, Humble Oil & Refining Company and Union Producing Company, Respondents here.

[3] These orders and the related certificate applications were made available by the Commission to all interested parties in its Public Reference Room (J.A. 276). Counsel for Sun Oil Company has been informed by the Office of Public Information of the Commission that since early 1960 copies of all temporary certificates issued have been placed in a special book in the Commission's Public Reference Room for easy access by the public. This is supplementary to the Commission's Rules of Practice and Procedure providing for public access to all filings and Commission orders relating to such filings [18 CFR 1.36(c)].

The United Gas Improvement Company's equivocal contention that the Commission did not make copies of its temporary certificate orders available in its Public Reference Room until sometime after August 30, 1962 appears to be factually erroneous and is contrary to the record below (Pet. No. 1134, p. 9).

each of the proposed sales at the initial contract prices. Certain of these certificate authorizations expressly provided for the possibility of later refunds in stated circumstances (J.A. 283-284). However, the temporary certificate orders placed in issue by Petitioners did not contain any such refund condition or any forewarning that the prices authorized would be subject to a retroactive refund imposition by the Commission at a later date (J.A. 190-191, 381).

Thereafter, distributor Petitioners [4] filed a joint motion, in the nature of an application for rehearing of the Commission's orders granting the unconditioned temporary certificates, seeking the imposition of refund conditions. The Commission, after careful consideration and on the basis of detailed findings, denied this motion by its order of February 5, 1963 (J.A. 275-282; Appendix B, *infra*, pp. 16a-24a).

Following hearings upon the applications for permanent certificates, the Commission issued its decision below on March 23, 1964 (*Amerada Petroleum Corp.*, 31 FPC 623; J.A. 354-396), in which it determined an "in-line" price of 16 cents per Mcf for the period in question based upon the evidence admitted. In its decision the Commission also asserted the power, in disregard of its order of February 5, 1963, to require the refund of such amounts collected in reliance upon the temporary certificates as were higher than the subsequently determined "in-line" price of 16 cents.

Upon judicial review of the Commission's decision, the court below affirmed the 16 cent "in-line" price de-

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[4] The United Gas Improvement Company, Petitioner in No. 1134; Long Island Lighting Company and Philadelphia Electric Company, Petitioners in No. 1135.

termination because it was supported by substantial evidence (370 F. 2d at 188-191; FPC Pet., App. pp. 25-31). However, it held that the Commission lacked the power to require the refund of amounts collected in reliance upon the temporary certificates in the particular circumstances involved (370 F. 2d at 192-194; FPC Pet., App. pp. 34-39).[5]

ARGUMENT

Refund Issue

The court below held that the Commission lacked the power to require the refund of amounts collected by Respondents pursuant to lawful certificate authorizations granted by the Commission. The amounts in question were collected in reliance upon temporary certificate orders which contained no forewarning that refunds might ultimately be ordered. While Petitioners have deliberately neglected to mention it, the Commission made absolutely clear by its order of February 5, 1963 that the temporary certificates it had issued were firm authorizations which would not be modified retroactively. All of these orders became final before the Commission asserted the power to unsettle them in Opinion No. 422. In these circumstances, the court below properly held that the Commission could not require refunds.

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[5] In the decision below the court noted that the Commission had actually ordered the producer certificate applicants to refund by its subsequently-issued Opinion No. 501 (Pet. No. 1133, App. p. 32). On March 27, 1967 the court below set aside this latter opinion by a *per curiam* order on the sole basis of its disposition of the refund issue challenged here. *Standard Oil Company of Texas* v. *Federal Power Commission*, No. 9289, — F. 2d —.

Petitioners, however, contend that this holding of the court below should be reviewed because it (1) conflicts with this Court's *Callery* decision;[6] (2) conflicts with the District of Columbia Circuit's *Skelly* decision;[7] and (3) presents an important question under the Natural Gas Act. These asserted grounds are in error and fail to demonstrate sufficient cause for granting review of the decision below on the refund issue.

1. In *Callery,* this Court held that the Commission could require the refund of certain amounts collected pursuant to certificate orders which had never become final and had been set aside on judicial review. There, the certificate holders were on notice of the possible invalidation of their certificates which ultimately occurred. In its Petition, the Commission now contends, contrary to fact, that there was no "explicit warning in *Callery*" of the possibility of refunds (FPC Pet., p. 12). This Court, however, observed in *Callery* that the Commission had given explicit notice to the producers involved that it would require refund of amounts collected under the invalidated certificates (382 U.S. at 226).

The case-at-bar presents a distinctly different situation from that in *Callery.* Here, temporary certificate orders containing no refund conditions were lawfully issued to producer Respondents pursuant to Section 7 of the Natural Gas Act and the Commission's

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[6] *United Gas Improvement Co., et al.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965).

[7] *Public Serv. Comm. of New York* v. *Federal Power Commission,* 329 F. 2d 242 (1964), *cert. den. sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963.

valid rules thereunder, *Federal Power Commission* v. *H. L. Hunt, et al.*, 376 U.S. 515, 520 (1964); *P.S.C. of N.Y.* v. *Federal Power Commission*, 327 F. 2d 893, 896 (D.C. Cir. 1964). In reliance upon these certificates, which became final as a matter of law,[8] the producers commenced deliveries at authorized initial prices which were maintained during the entire period of the temporary certificates, *Federal Power Commission* v. *H. L. Hunt, et al., supra.*

Of crucial importance, the Commission held by its order of February 5, 1963 that the initial prices it had authorized were not subject to refund and would continue to be collected "until a prospective price could be determined after hearing" (J.A. 275; App. B, *infra*, p. 16a).

In *Callery*, the certificate holders were specifically forewarned of the possibility of refunds. By contrast, the parties here were explicitly told by the Commission that refunds would not be ordered:

> "* * * Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the

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[8] *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961). In that case, the Fifth Circuit dismissed producer attacks upon temporary certificates as untimely when made on review of subsequently-issued permanent certificates. The Fifth Circuit held that temporary certificate orders are final orders which must be reviewed within the time provided by the Natural Gas Act.

> most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (J.A. 277; App. B, *infra,* pp. 18a-19a).

The Commission's order of February 5, 1963 was clearly reviewable. However, no review was sought. In the circumstances, this order became binding upon all Petitioners here, including the Commission itself. *Pan American Petroleum Corp.* v. *Federal Power Commission,* 322 F. 2d 999, 1004 (D.C. Cir. 1963).

This Court explained in *Callery* the limited basis upon which it upheld the Commission's imposition of refund liabilities in that case, as follows:

> "* * * While the Commission 'has no power to make reparation orders,' *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591, 618, its power to fix rates under § 5 being prospective only, *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* 360 U.S. at 389, it is not so restricted where its order, which never became final, has been overturned by a reviewing court * * *" (382 U.S. at 229).

Notwithstanding these limitations, Petitioners are here seeking the reparation of monies collected pursuant to and in reliance upon orders which became final and were never overturned by a reviewing court.[9]

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[9] Petitioners' contentions that the Commission has the power to undo conclusively valid orders by retroactive modification is not only erroneous, but would make reliance upon any agency's order wholly unjustified.

2. Petitioners also contend that the decision of the court below and the decision of the District of Columbia Circuit in *Skelly, supra,* are in conflict. In *Skelly,* the District of Columbia Circuit concluded that the Commission had the discretionary power to order refunds because the Commission had issued the temporary certificates in question without mature consideration (329 F. 2d at 249). In this case, as the court below found, the Commission, after mature consideration, refused to impose refund conditions upon the temporary certificates which it had issued (FPC Pet., App. pp. 34-35).[10]

Moreover, the temporary certificates in *Skelly* involved sales under contracts executed prior to the Commission's promulgation of its *Statement of General Policy No. 61-1,* issued September 28, 1960 (24 FPC

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[10] Petitioners ignore the language of the Commission's February 5th order stating that the prices which had been authorized were not subject to refund and would continue to be collected until a prospective price could be determined. They erroneously contend that these initial prices were "provisional" and subject to retroactive modification (FPC Pet., p. 11; see also, Pet. No. 1135, p. 22). They largely rely on certain routine language contained in these temporary certificate orders, to the effect that the particular authorization is granted without prejudice to future action by the Commission (J.A. 190). Virtually identical routine language appears in the permanent certificates issued in the administrative proceeding below (J.A. 387). It cannot reasonably be maintained that such language rendered the temporary rates "provisional" any more than identical language rendered the permanent rates "provisional." As the court below found, the obvious intent of such language in temporary certificates, was to indicate that the Commission was not binding itself to issue an identical permanent certificate of prospective effect (FPC Pet., App. pp. 37-38).

818; App. A, *infra* pp. 1a-6a).[11] This Policy Statement established an initial price standard of 18 cents per Mcf for new sales in Texas Railroad Commission District No. 4. Each of the new sales involved herein was temporarily certificated at 18 cents or less in conformity with the Policy Statement. The Policy Statement put all interested parties on notice that it would be implemented.[12] Indeed, the temporary certificates involved here were just such an implementation, *J. M. Huber Corporation* v. *Federal Power Commission,* 294 F. 2d 568, 570 (3rd Cir. 1961). As the Commission observed in its order of February 5, 1963 herein, the price levels established by the Policy Statement were designed to enable producers to obtain authorizations which would provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas (App. B, *infra,* p. 19a). Petitioners' contention that interested parties were prejudiced by lack of notice that the Commission would implement its Policy Statement by issuing temporary certificates is highly misleading. It is clear that this implementation of the Commission's Policy Statement was judicially reviewable, *Federal Power Commission* v. *H. L. Hunt et al., supra.* Furthermore, there can be no question that distributor-Petitioners, as evidenced by their

[11] This Policy Statement was issued simultaneously with the Commission's decision in *Phillips Petroleum Company,* 24 FPC 537, 547 (1960), affirmed, *sub nom. Wisconsin* v. *F.P.C.,* 303 F. 2d 380 (D.C. Cir. 1963), affirmed, 373 U.S. 294 (1963). It was published in the *Federal Register* on October 5, 1960 (25 F.R. 9578).

[12] In its Policy Statement, the Commission explained the significance of the 18 cent price standard established for District No. 4 "as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition" (24 FPC 818; App. A, *infra,* p. 1a).

own actions below, had actual notice of the temporary certificates involved here and were afforded full opportunity to contest the propriety of these certificates.

3. In an effort to secure this Court's review of the decision below on the refund issue, the Petitioners also claim that it presents an important question in the administration of the Natural Gas Act. In support, Petitioners cite *extra*-record calculations of refunds which may be required in a number of *other* cases. The Commission contends that those other cases involve temporary certificates which the Commission issued without express refund conditions (Pet. No. 1133, pp. 8-9). The situation in this case is not that the Commission simply failed to impose express refund conditions. Rather, the Commission here affirmatively declared that refunds would not be ordered. Thus, the broad question posed by the Petitioners on the refund issue is not present in this case. Accordingly, the claimed importance of review in this case has not been demonstrated.

The Price Line Question

Distributor Petitioners[18] ask this Court to review the decision of the court below affirming the Commission's 16.0 cent price line determination. As the court below noted, the question there was whether substantial evidence supported the Commission's conclusion (Pet. No. 1133, App. A, p. 25). The same question is presented here. Petitioners in No. 1135 allege a conflict on the price line issue between the decision below and the District of Columbia Circuit's decision in

[18] The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York (Joint Pet. No. 1135) and The United Gas Improvement Company (Pet. No. 1134).

Public Service Com. of New York v. *Federal Power Commission*, ... F. 2d ... (decided February 7, 1967), but ignore the fact that the District of Columbia Circuit expressly recognized the lack of conflict between its decision and the decision below (Pet. No. 1135, App. pp. 27a-28a).

To put the substantial evidence issue here in proper perspective, it is necessary to consider the context in which this case arose, the Presiding Examiner's initial decision, and the Commission's opinion setting the 16.0 cent line.

On September 28, 1960 the Commission issued its Statement of General Policy entitled *Establishment of Price Standards to be Applied in Determining the Acceptability of Initial Price Proposals and Increased Rate Filings by Independent Producers of Natural Gas.* This Policy Statement promulgated standards for the guidance of the Commission and all interested parties in determining "whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended." On the basis of extensive cost, economic and price information available, the Commission established price schedules for 21 separate natural gas producing areas, including Texas Railroad Commission District No. 4. The initial rate standard fixed by the Policy Statement for that area was 18.0 cents per Mcf which was maintained for nearly two years as the initial rate standard for sales of natural gas in Texas District No. 4 (App. A, *infra*, p. 6a).[14] It was

[14] On August 30, 1962 the Commission amended its Policy Statement by providing an initial rate of 16.0 cents per Mcf for that area, *Fifth Amendment to Statement of General Policy No. 61-1*, 28 FPC 441 (App. A, *infra*, pp. 7a-8a).

during this two-year period that the contracts at issue in this case were executed.

On August 30, 1962 the Commission issued its Opinion No. 362 in *Skelly Oil Company,* 28 FPC 401.[15] There the Commission established a Texas District No. 4 price line of 15.0 cents per Mcf for the time period under consideration, but held that additional evidence was needed to fix a price line for contracts executed after the issuance of the Policy Statement (28 FPC at 412).

In this context, the administrative proceedings below were set for hearing by order of August 30, 1962 (J.A. 197-202). The Commission undertook to consolidate for hearing all pending producer certificate applications seeking authorization to make sales of natural gas in Texas District No. 4.

Thereafter, the hearing before the Commission's Presiding Examiner commenced. Pursuant to motions to strike filed by the distributor Petitioners here, as well as the Commission Staff, the Presiding Examiner rejected all cost, supply-demand and economic trend presentations (J.A. 18-130) which the certificate applicants had offered in support of their initial contract prices. The Examiner's reasoning was that while such presentations would be appropriate in proceedings under Sections 4 and 5 of the Natural Gas Act, they were not relevant in a producer certificate case under Section 7, where there was only an in-line price issue (J.A. 234-260). With the scope of the proceeding thus defined, the Examiner received the testimony and

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[15] Affirmed in part, *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied, sub nom. Prado Oil and Gas Co.* v. *Federal Power Commission,* 377 U.S. 963.

related price line Exhibit No. 16 prepared by a witness for the Commission Staff (J.A. 163-188).[16] Pursuant to contentions urged by distributor Petitioners here, the Examiner found that the relevant period for making the price line determination was September 28, 1960 through August 31, 1962. On the basis of 14 contracts[17] executed during that period, which the Commission had permanently certificated, the Examiner reached a 15 cent price line conclusion (J.A. 335).

On review of the Examiner's decision the Commission issued Opinion No. 422, and upheld the price line period fixed by the Examiner[18] but found that his 15 cent line was wholly inappropriate. In so holding, the Commission relied upon the Ninth Circuit's *U.G.I.* decision[19] that "the price line is intended to reflect current conditions in the industry", and accordingly must be based on "prices under which a substantial amount of natural gas presently moves in interstate commerce" (283 F. 2d at 824). The Commission found that the few permanently certificated sales used by the Examiner amounted to only 1.39 percent of the

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[16] The Examiner also received testimony showing that the 18.0 cent Policy Statement price standard had a substantive impact on contract negotiations and that the producer certificate applicants had relied on that policy standard (J.A. 131-135, 142-155).

[17] Staff's price line exhibit listed more than 290 contracts.

[18] The distributor Petitioners do not contest the propriety of the time period under consideration, which was based on their contentions before the Examiner (J.A. 335).

[19] *United Gas Improvement Company* v. *Federal Power Commission*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879.

gas volumes shown in Staff price line exhibit (J.A. 371).[20] In these circumstances, the Commission held that the Examiner's price line determination was not based on a substantial amount of natural gas moving in interstate commerce. The Commission held that it:

> "* * * would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets" (J.A. 372).

The Commission then found that "unlike any previous 'in-line' determination" it had made, the record in this case contained neither a substantial number of relevant permanently-certificated sales[21] nor evidence of substantial volumes moving under permanent certificates (J.A. 370). In these circumstances, the Commission held that it was proper to give some evidentiary weight to the sales which it had temporarily certificated, noting, however, that permanent certificates for

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[20] The Commission pointed out that two of the five sales proposed by Sun Oil Company alone involved "nearly twice the monthly volumes" of the permanently certificated sales considered by the Examiner (J.A. 371). The record shows that the certificate applications in this case involved approximately 2,635,000 Mcf per month (J.A. 322) while the sales used by the Examiner in reaching his price line conclusion involved only 356,000 Mcf per month (J.A. 335).

[21] The Commission noted that it was not by chance that so few permanent certificates were granted during the two-year period in question because all contracts proposing a price higher than 15.0 cents had been opposed by the distributor Petitioners. The Commission ruled that the few sales considered by the Examiner could not control the price line applicable to sales which involved "over seven times" the volumes which had been permanently certificated (J.A. 370-371).

price line purposes were "decidedly more persuasive" (J.A. 370).

On the basis of both the permanently and the temporarily certificated contracts analyzed in Staff's price line exhibit, the Commission made numerous findings of fact. The Commission found that 71 percent of the gas in the area during the time period involved was sold at a price of 17 cents or more while 82 percent of the gas was sold at a price of 16 cents or more. The Commission further found that the weighted average price during the period was approximately 17.2 cents per Mcf (J.A. 373-374). While these findings admittedly pointed "in the direction of a higher price" (J.A. 379), the Commission determined an "in-line" price of 16.0 cents per Mcf for the period in question.[22]

The Commission observed as follows:

> "* * * Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed. The 16 cent determination herein thus not only preserves, but actually rolls back, the initially considered price line for the period in issue" (J.A. 379).

In addition to its evaluation of Staff's price line evidence, the Commission also concluded that "some measure of weight" had to be accorded the 18.0 cent price standard established in its General Policy. In this respect, the Commission reviewed the testimony

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[22] The Commission found from Staff's price line exhibit that 16 cents was "the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question" (J.A. 379).

in the record offered by the producers (e.g., J.A. 131-135) showing that the Policy Statement had a substantial influence upon contract negotiations during the two-year period under consideration (J.A. 376-378).

Distributor Petitioners contend that the Commission erred in considering sales under temporary certificates in making its price line determination. This contention is defective because it ignores the Commission's explicit findings, which distributor Petitioners do not contest, that the few sales which had been permanently certificated during the pricing period in question were "isolated and inherently nonrepresentative" and did not involve a substantial amount of natural gas moving in interstate commerce. In these circumstances it was only reasonable that the Commission give some weight to sales under temporary certificates, when in absence of that consideration, there would have been insufficient basis for finding a price line for the period in question.

Distributor Petitioners also claim that the Commission's consideration of its own Policy Statement constituted error. This contention is highly misleading because, as its Opinion makes clear, the Commission did not merely consider the Policy Statement and nothing more, but weighed extensive testimony in the record offered by the producer certificate applicants showing the *effect* of the Policy Statement in the world of gas sales contract negotiations (*e.g.*, J.A. 131-134). This evidence was properly offered and admitted without objection, and there can be no claim of error in the Commission's consideration of it.

The question, therefore, is whether the evidence which the Commission considered was substantial.[23] While the evidence pointed in the direction of a higher price line, there is substantial evidence to support the Commission's 16-cent price line determination, *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966); *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, ... U.S. ..., 87 S. Ct. 255 (1966).

Distributor Petitioners also contend that a conflict exists between the decision below and the District of Columbia Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission*, ... F. 2d .... (decided February 7, 1967). That case involved review of Commission Opinions fixing "in-line" prices for Texas Railroad Commission District Nos. 2 and 3, respectively. The Commission has historically treated each of those areas as separate and distinct from Texas District No. 4 for "in-line" pricing. This is demonstrated by the separate delineation of these three pricing areas by the Commission in its Statement of General Policy No. 61-1, and amendments thereto (App. A, *infra* pp. 6a, 8a). Indeed, the Commission once considered the possibility of consolidating these three Districts as a single "in-line" pricing area but decided against it, 30 FPC 1374 (1963). Thus, distributor Petitioners' discussion of the Texas Gulf Coast area as if it were a single area for the purpose of "in-line" pricing is misleading.

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[23] Congress has provided that, on judicial review of an order of the Commission, "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," 15 U.S.C. 717r(b).

Moreover, the D. C. Circuit explicitly distinguished the case before it from the case-at-bar, as follows:

> "However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated. * * * In our case there is a substantial volume moving under permanent certificates. We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison" (Pet. No. 1135, App. p. 28a, footnotes omitted).

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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April 7, 1967

APPENDIX A

I

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

STATEMENT OF GENERAL POLICY NO. 61-1

ESTABLISHMENT OF PRICE STANDARDS TO BE APPLIED IN DETERMINING THE ACCEPTABILITY OF INITIAL PRICE PROPOSALS AND INCREASED RATE FILINGS BY INDEPENDENT PRODUCERS OF NATURAL GAS

(Issued September 28, 1960)*

Before Commissioners: JEROME K. KUYKENDALL, *Chairman;* FREDERICK STUECK and ARTHUR KLINE.

This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.

Since the Supreme Court's 1954 decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 674, holding that under the Natural Gas Act the Commission has jurisdiction over the interstate transportation and interstate sale for resale of natural gas by independent producers,

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* Published in Federal Register, October 5, 1960 (25 F.R. 9578) and corrected, April 11, 1961 (26 F.R. 3066). Codified as 18 C.F.R. 2.56. Secretary's rejection of application for rehearing affirmed by order issued November 25, 1960. Amended by orders issued October 25, 1960, and December 20, 1960, 24 FPC 902, and 1107, respectively, and March 29, 1961, 25 FPC 595.

and that such producers are "natural-gas companies" under the Act, the Commission's regulatory task has increased enormously in size and difficulty. In contrast to the regulation of less than 200 pipeline companies prior to the *Phillips* case, under this decision Commission regulation extends to several thousand independent producers of natural gas. Although this producer segment of the natural gas industry differs from the pipeline transmission portion in fundamental particulars, its multiplicity of sales and services are now required to be covered by many thousands of rate and certificate filings under the Act.

This ever-growing volume of additional rate and certificate filings has placed an increasing burden not only on this Commission and other regulatory commissions, but on all those—consumers, producers, pipeline companies, and distributing companies as well—whose interests we must consider in administering the Act. It is essential, particularly in the interest of the consumer for whose protection the statute was enacted, that means be found for making the most effective use possible of the Commission's limited facilities in discharging the new and additional duties called for by the regulation of producers of natural gas. In our opinion, the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation. Our many reasons for establishing these maximum acceptable rates as opposed to establishing rates based on a full cost-rate base hearing for every rate filing made by producers are set forth at considerable length in our opinion No. 338, *Phillips Petroleum Co.*, Docket No. G-1148, et al., pp. 542 thru 548, *ante,* issued on this date.

Some further explanation is required of certain aspects of these area rate levels. The geographical areas which we have used are convenient and well known. They are

not necessarily in complete accord with geographical and economic factors which may be relevant to the establishment of pricing areas. As experience and changing factors may indicate, we will change or alter these areas from time to time in order to eliminate such inequities as may appear to exist because of our use of geographical boundaries.

In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. Of necessity, we have not set forth the adjustments to these prices which must be made to take into account every possible provision of every contract which may affect the actual price, such as Btu adjustments, conditions of delivery, etc. The relevance of such adjustments to the basic contract price and the appropriate established price standard must be considered as each filing is made. As it becomes apparent that certain adjustments have general applicability in a specific area, the area price standard will be revised and set forth in greater detail with regard to the exact sale conditions to which the rate applies. We should, however, make it clear that these present price standards apply to pipeline quality gas as that term is generally understood in each area and, except for the Louisiana prices, are inclusive of all taxes.

Two price standards are set for each area. Initial prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts. For this reason, we have found it advisable to adopt two schedules of prices, one pertaining to initial prices in new contracts and one pertaining to

escalated prices in existing contracts. It is anticipated that these differences in price levels will be reduced and eventually eliminated as subsequent experience brings about revisions in the prices in the various areas.

It will be noted that we have omitted listing an initial price level for sales from Southern Louisiana and Mississippi. The proper initial price level for these areas is currently the subject of two hearings pursuant to Supreme Court Decisions. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378; *Public Service Commsision* v. *F.P.C.,* 361 U.S. 195, F.P.C. Docket Nos. G-11024, *et al.,* and G-13143, *et al.,* respectively. Clearly, in light of these cases, it would not be proper at this time for us to announce an initial rate level for these areas prior to a final determination of these cases.

These price levels, as announced by Appendix A attached to this statement, are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level. As with the areas, the prices will be adjusted from time to time as such facts as may come before us compel such adjustments. For the present, and in the absence of compelling evidence calling for other action by us, proposed initial sales of natural gas by independent producers which include rates higher than those indicated in the appendix attached to this statement shall be denied a certificate or certificated only upon the condition that lower rates be filed, and all rate changes filed under existing contracts which call for a rate exceeding the indicated price level in the attached appendix to this statement shall be suspended.

Where a proposed price exceeds the indicated rate level and is therefore conditioned or suspended we will, in determining whether the higher price is justified, not necessarily consider only the financial requirements of the individual producer proposing the price but will consider

all of the above elements relevant to the industry generally in the area concerned. Similar evidence will also be required from purchasers or their customers who object to any of the price levels or any specific price. Our determination will be in the nature of setting a price for the gas itself from any source questioned and not necessarily a price applicable solely to the party proposing some other price. In this connection we urge that all parties who have any interest in changing an area price join in such a proceeding leading to a determination of a proper revision, if any, in an area price or in the geographical area itself. As there will undoubtedly be numerous parties with an interest in such a proceeding full use should be made of prehearing procedures to reduce the factual issues and consolidate factual presentations to eliminate repetition and duplication of evidence. Because of the impossibility of giving detailed instructions for every proceeding, the precise course of each hearing and the admissibility and relevant weight of each type of evidence must be determined as hearings proceed and we expect to issue additional policy statements from time to time clarifying various aspects of these procedures and principles. The new area rate determinations resulting from such proceedings will represent final determinations of just rates for the areas involved as of the date of the decision and for prior periods.

APPENDIX A

(To Statement of General Policy No. 61-1)

Area price levels for natural gas sales by independent producers

[All rates at 14.65 Psia]

Area	Initial service rates per Mcf	Increased rates per Mcf
Texas:		
District No. 1	15 cents	14 cents.
District No. 2	18 cents	14 cents.
District No. 3	18 cents	14 cents.
District No. 4	18 cents	14 cents.
District No. 5	14 cents	14 cents.
District No. 6	15 cents	14 cents.
District No. 7-b	14 cents	11 cents.
District No. 7-c	16 cents	11 cents.
District No. 8	16 cents	11 cents.
District No. 9	14 cents	14 cents.
District No. 10	17 cents	11 cents.
Louisiana:		
Southern	Not determined	13.7 cents (14 cents at 15.025 psia).
Northern	16.6 cents (17 cents at 15.025 psia)	13.7 cents (14 cents at 15.025 psia).
Mississippi	Not determined	13.7 cents (14 cents at 15.025 psia).
Oklahoma:		
Panhandle area	17 cents	11 cents.
Other	15 cents	11 cents.
Carter-Knox	16.8 cents	11 cents
Kansas	16 cents	11 cents.
New Mexico:		
Permian Basin	16 cents	11 cents.
San Juan Basin	12.7 cents (13 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Colorado	14.6 cents (15 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Wyoming	15 cents	12.7 cents (13 cents at 15.025 psia).
West Virginia	26.8 cents (28 cents at 15.325 psia)	23.9 cents (25 cents at 15.325 psia).

II

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

FIFTH AMENDMENT TO STATEMENT OF GENERAL POLICY NO. 61-1

(Issued August 30, 1962)*

Before Commissioners: JOSEPH C. SWIDLER, *Chairman;* HOWARD MORGAN, L. J. O'CONNOR, JR., CHARLES R. ROSS, and HAROLD C. WOODWARD.

The Commission's Statement of General Policy No. 61-1 issued September 28, 1960, 24 FPC 818, announced a price level of 18¢ per Mcf for initial sales in Texas District No. 4 (at 14.65 psia). The Statement of Policy specified that the price levels announced therein were to be "adjusted from time to time as such facts as may come before us compel such adjustments." The price level previously announced for Southern Louisiana was in fact adjusted by the Fourth Amendment to the Statement of General Policy on October 31, 1961.

The Commission in its opinion in the *Skelly* case issued this date has had occasion to re-examine the question of the in-line price in Texas District No. 4 immediately prior to September 28, 1960, in light of the subsequent court decisions dealing with the initial pricing question in producer certificate cases.

We have also reviewed the sales in District No. 4 subsequent to September 28, 1960. We have carefully re-examined the appropriate level of initial ceilings in this district in light of present conditions in the area giving due

* Published in Federal Register on September 7, 1962 (27 F.R. 8918).

consideration to the applicable court decisions and the factors set forth in our original statement of policy.[1]

Just as was the case in our revision of the ceiling price in South Louisiana, our guiding purpose here is to arrive at a revised price which will enable the Commission to hold the line on new sales in this area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas. We conclude that, effective this date, the ceiling price level for initial sales in Texas District No. 4, inclusive of state taxes, shall be 16 cents per Mcf (at 14.65 psia).

Commissioners Morgan and Ross *dissenting* and filed separate statements.

MORGAN, Commissioner, *dissenting:*

The Supreme Court, in the Hope case,[1] declared that "the fixing of just and reasonable prices was the heart of the new regulatory system" encompassed by the Natural Gas Act.

The Court also observed that:

> In passing on such applications for certificates of convenience and necessity the Commission was told by § 7(c), as originally enacted, that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate consumption * * *

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[1] We there stated that these "included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas."

[1] *Federal Power Commission, et al.* v. *Hope Natural Gas Co.*, 320 U.S. 591 at 611 (1944).

> at the *lowest possible* reasonable rate consistent with the maintenance of adequate service in the public interest." (Italics supplied.)

Fifteen years later, in the now famous CATCO case,[2] the Court not only found it necessary to repeat both admonitions but, with respect to its reference to the "lowest possible reasonable rate", offered the following comments in the form of a footnote:

> The 1942 amendments to § 7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H.R. 5249, 77th Cong., 1st Sess. 18-19; H.R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

In CATCO the court placed a continuing responsibility on us, in certificating procedures, to prevent "out of line" prices and to "hold the line awaiting adjudication of a just and reasonable rate."

Under the terms of our Statement of General Policy No. 61-1,[3] we have been attempting to carry out our responsibilities through the device of so-called area prices—a currently fashionable synonym for what used to be called "fair field prices." As the majority has noted, the Statement of Policy contemplates another continuing responsibility on our part: to adjust the various area price levels "from time to time as such facts as may come before us compel such adjustments."[4]

Here we are faced with the necessity to act under the quoted portion of our own policy statement. Needless to

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[2] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York, et al.*, 360 U.S. 378 at 388 (1959).

[3] Issued September 28, 1960, 24 FPC 818.

[4] 24 FPC at 820.

say, whatever action we take must also satisfy both the purpose of the Natural Gas Act and the mandates of the Supreme Court.

I maintain that the majority's action herein falls significantly short of satisfying either.

The action of the majority is, of course, an attempt to carry out the Commission's responsibility to adjust prices "from time to time as such facts as may come before us compel such adjustments." What are those facts? They are the facts exposed in the record and in the Commission's files during the course of the *Skelly* case.[5] Those facts demonstrated incontrovertibly that an in-line ceiling price in Texas Railroad District 4 prior to issuance of the Policy Statement could be no higher than 15¢, rather than the 18¢ promulgated by the then members of the Commission in their Policy Statement. That demonstration in *Skelly* compelled us—unanimously—to reduce prices contained in contracts executed in District 4 prior to September 28, 1960 (the effective date of the Policy Statement) to a maximum of 15¢ per Mcf. Unfortunately, because of errors for which the present Commissioners are in no wise responsible, this reduction was not made retroactive.

Exposure of those same facts now compels us to adjust the interim area ceiling price in Railroad District 4 as contemplated by the Policy Statement. But here we are not unanimous. The majority, after agreeing that 15¢ was the proper in-line maximum price in Texas Railroad District 4 up to 11:59 p.m., September 27, 1960, now has decided that as of 12:01 a.m., September 28, 1960, the in-line price was—and is—16¢ per Mcf. Explanation for

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[5] Opinion No. 362 *Skelly Oil Company*, Docket No. G-18638, *et al.*, 28 FPC 401. *Skelly* is a most important case in the brief and turbulent history of area pricing, concerning which I shall have a great deal more to say in a dissent to the decision in that case which, at this date, is still to be written.

this one-cent escalation, representing a 6⅔% increase in the "in-line" price of gas, is notable by its complete absence.

Does establishment of a 16¢ ceiling price comply with the Supreme Court's instruction to "hold the line awaiting adjudication of a just and reasonable rate"?

Is this "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest," as required by "applicable court decisions"?

The majority claims to have given "due consideration" not only to "applicable court decisions" but to other factors, including:

> * * * cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas.

I participated fully in all Commission discussions of *Skelly* and related matters, including the Commission meeting at which we took affirmative action on this case. I do not recall any discussion or consideration of this matter as extensive as that inferred by the majority's claim. I certainly recall no demonstration that 16¢ is "the lowest possible reasonable rate." On the contrary, the few workpapers considered by us demonstrated to my satisfaction that 16¢ is a higher price than is necessary to meet the standards of reasonableness and adequacy erected by the Court.

I maintain that the facts exposed in *Skelly*, viewed in the light of the Natural Gas Act, CATCO, and the prohibitions laid down by the Ninth Circuit[6] against our using

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[6] *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, *cert.* den. 365 U.S. 881.

"suspect" and "tainted" prices, compel us to adopt an interim price for Railroad District 4 no higher than 15¢ per Mcf.

Skelly demonstrated not only that any price higher than 15¢ per Mcf was "out of line" prior to September 28, 1960, but that the Commission itself was "out of line" when it established an 18¢ price to take effect on that date. Here we have rightly eliminated that wrongful price, but the majority declines to "hold the line awaiting adjudication of a just and reasonable rate" and insists on a price higher than 15¢ for the period after September 28, 1960.

I am not averse to establishing a price other than 15¢ —either higher or lower—if it is first shown to be "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." No such showing—indeed, no showing of any kind—has been made in behalf of a price of 16¢. I therefore dissent.

Ross, Commissioner, *dissenting:*

Setting or changing an interim guide line price without the benefit of notice, hearing and record but guided by the Commission's expertise, represents one of the most solemn obligations any administrative body can perform. See my dissent in *Skelly Oil Company, et al.*, Docket No. G-18638, et al.

Justice Frankfurter in his dissent in *F.P.C.* v. *Hope Natural Gas Company*, 320 U.S. 591, page 626, discusses the role of the Commission's expertise in natural gas regulations, as follows:

> Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the ele-

> ments of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety * * *. It will not do to say that it must be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment.

The majority, in its expertise, states that 16¢ is the proper ceiling price level for sales in Texas R.R. District No. 4. The *Skelly* case, itself, reveals the prior 18¢ level as an example of a "glaringly bad prophecy" of a proper rate set by "the unguided discretion of the Commission." Is this new rate any better? What are the expressed reasons for this judgment? The majority, as one of the factors bearing on the ultimate price, state that they have reviewed the sales in District No. 4 subsequent to September 28, 1960. Thus, as I pointed out in my dissent, an improper price, in and of itself, becomes justification in a reappraisal of the appropriateness of the price upon challenge. This is circular reasoning if I ever saw any. This will be the principal defense adopted in the new proceeding ordered in Skelly.

The evil inherent in adopting an interim guide line price is the failure to set a standard upon which the Commission measured the price. It is all well and good to set forth a number of factors such as "cost information from decided and pending cases, existing and historical price structures, volumes of production, trends in production * * *" but the important matter is what is used in practice. Or, in the language of CATCO, what is in-lineness? Because of the possibility that interim guide line prices will remain in effect for substantial periods of time, changed only by decree and without notice, hearing and record and because such prices, particularly in new certificate cases have a tendency to become floors rather than the "maximum ac-

ceptable rates",[1] it is essential for the preservation of the administrative process to set forth the standards used.

It is easy to say what in-lineness does not mean. It certainly shouldn't mean comparing the highest heretofore certificated price in the area, see *Panhandle Eastern Pipe Line Co., et al.,* Docket No. CP60-103, *et al.,* nor should it mean a price higher than the majority of the prices, see *Continental Oil Co., et al.,* Docket No. G-11024, *et al.* In fact, one may not compare the proposed price with those that are at all clouded or suspect.[2]

I have great doubt, too, whether in-lineness should be based only on new sales. First, prices under the old contracts represent informed industry judgment as to the level of prices which are acceptable to them. Second, the bulk of the gas is supplied under old contracts. Third, it is not necessarily true that the bulk of the costs were incurred in the year of certification. Fourth, I have not as yet seen any factual evidence to indicate that the current costs of finding and developing gas are significantly higher than in 1960.

Nor should in-lineness be based upon sales made by an affiliate to its parent pipeline. Nor should in-lineness be based upon sales made to a new pipeline desperate for sources of gas, or to a pipeline, which has allowed its supply to become unreasonably low. In-lineness should also not be measured by prices that a pipeline might pay to keep another pipeline out of a field so it may monopolize the area. Nor should in-lineness mean prices based upon the desire or need of a pipeline for auxiliary products such as butane, propane or helium. Nor should in-lineness mean prices paid by a pipeline who has a monopoly in its service area or a pipeline which affiliates have gas purchase ad-

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[1] *Statement of General Policy No. 61-1,* p. 819.

[2] *United Gas Improvement Co.* v. *F.P.C.,* 283 F. 2d 817, *cert.* den. 365 U.S. 881.

justment clauses. Certainly, in-lineness should not be based upon prices paid by a pipeline engaged in the production business in the area to other independents.

Looking at in-lineness from another standpoint, it should not be based upon a distress sale by a producer to a pipeline when the pipeline can force an unconscionably low price on said producer. Also, sales by a producer of low volumes or sales from wells with poor deliverability should not be a measure. In fact, any case where the elements of fair play are not present should not be used to measure in-lineness. Thus, where any or all of the above enumerated factors are present, it is incumbent upon this Commission to gage their impact, and properly to discount their effects.

It is apparent, therefore, that proper in-lineness means the prices that prudent utility pipeline companies, acting in effect as agents for natural gas distribution companies which compete in a true energy market, would pay to financially responsible and informed producers in attempting to gain for the distribution companies the benefits they could obtain for themselves if they were able to bargain directly with those producers. Such prices will, of course, vary from time to time depending upon economic conditions both in the field and in the end market. The ultimate determination of an in-line price certainly should not be among the highest untainted heretofore certificated prices, for the reasons advanced in detail above, but rather should be based on the bulk line average of existing prices, since these are the only ones which reflect the economic conditions in the field, the end market, and the specific conditions applicable to the pipeline intermediary.

On the basis of the evidence presented here, and particularly in view of the lack thereof, and on the basis of evidence presented in the *Skelly* case, I would find the proper in-line price for District No. 4 as 15¢.

WOODWARD, *Commissioner:* I join in and adopt the dissenting opinion of Commissioner O'Connor filed herein.

APPENDIX B

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION
AMERADA PETROLEUM CORPORATION, ET AL.,

DOCKET NO. CI62-1544, ET AL.

ORDER DENYING MOTION TO IMPOSE PRICE CONDITIONS IN TEMPORARY CERTIFICATES

(Issued February 5, 1963)

Before Commissioners: JOSEPH C. SWIDLER, *Chairman;* HOWARD MORGAN, L. J. O'CONNOR, JR., CHARLES R. ROSS, and HAROLD C. WOODWARD.

On November 29, 1962, the Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company (Movants) filed a motion requesting that the Commission vacate the temporary certificates issued to the various party-applicants to the above-entitled proceeding or, in the alternative, impose a condition in each of these temporaries, requiring that the applicant refund to the purchaser, with interest at 7% per annum, any amounts hereafter collected which may be determined to be in excess of the price required by the public convenience and necessity under each applicant's respective certificate docket.

Each of the producers herein except Sun Oil Company in Docket No. CI62-276 have been granted temporary authority to make sales in interstate commerce. In almost every instance the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. Sales of gas were commenced by each of the producers pursuant to and in reliance upon the temporary authority.

Essentially the motion constitutes an application for rehearing of the Commission's Letter Orders issuing tem-

porary authorizations to certain of the producers herein. Section 19(a) of the Natural Gas Act provides that an application for rehearing must be submitted within 30 days following the issuance of an order. The motion herein was not submitted within the statutory 30-day period following the issuance of the temporary authorizations. There is no question that such temporary authorizations constitute appealable orders and, therefore rehearing should be sought within 30 days. However, we recognize that the letter orders issuing the authorizations were unreported, although copies thereof, were available to the public. We shall not, therefore, dismiss the motion as being untimely. However, for the reasons hereinafter set forth, we must deny the motion to terminate the existing temporary authorizations.

Section 7(c) of the Natural Gas Act empowers the Commission to issue temporary certificates when emergency situations exist. We have promulgated regulations recognizing certain situations which constitute emergency situations as to independent producers. See regulations under the Natural Gas Act, Section 157.28.[1] Each of the producers who requested the issuance of temporary authorization to sell gas set forth an emergency situation which, under our regulations, permitted the issuance of such authority. Temporary certificates were therefore issued. Movants would now have us withdraw the existing authority and proffer to each producer a new temporary certificate conditioned to meet the requested requirements, giving each producer the opportunity to reject such temporary authority. Movants ignore the fact that the producers and pipelines here involved have already acted upon the temporary authorizations as issued and have

[1] Also see order denying applications of New York Commission for rehearing and reconsideration and motion for a stay issued December 31, 1962, in *J. Ray McDermott, et al.*, Docket No. CI63-301, *et. al.*

undoubtedly expended considerable funds in justifiable reliance thereon. Apparenlty Movants have also ignored the dependence of pipelines and their customers upon continued service once a reservoir of natural gas begins flowing into interstate lines. To now offer the producers an opportunity to reject a substituted temporary certificate, conditioned to provide for refunds down to the price to be fixed after Section 7 hearing we have ordered, would clearly be contrary to the public interest. It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas.

Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. This we will not do. Assuming, without deciding, that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with "such certainty as to allow the exercise of choice upon [the producers'] part." Sunray *Mid-Continent Oil Com-*

pany v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy.

While this case relates to the imposition of refund conditions in temporary authorizations already issued, we do not wish our determination here to be construed as indicating that we will normally impose such a condition if the applications for temporary authority were before us for the first time. On the contrary, as we made clear in our order in *J. Ray McDermott, supra,* in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporary certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate. Our policy in this respect was clearly set forth in the Fourth Amendment to our Statement of General Policy No. 61-1 in which we reduced the Southern Louisiana ceiling and observed that the Commission's interim ceilings represent the Commission's judgment of a ceiling which "will enable the Commission to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas."

In view of these circumstances we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates issued to the above-mentioned producers as requested by Movants.

The Commission orders:

The request made by the Long Island Lighting Company, Philadelphia Electric Company and the United Gas Improvement Company either to have the temporary certificates issued to the party applicants to the above-styled proceedings vacated or, in the alternative for the imposition of a condition in each of these temporaries be and hereby is denied.

Commissioners Morgan and Ross *concurring*, filed separate statements appended hereto.

MORGAN, *Commissioner*, concurring:

I concur only in the result.

Unfortunately, past indiscretions committed by this Commission in the matter of granting temporary certificates do not permit us now, in good grace, summarily to grant relief sought by the consuming public.

I therefore limit myself to the hope that proceedings on the merits of this matter will soon be concluded; and that the rates in question will be adjusted, where necessary, to correspond to the "lowest possible reasonable rate" required by the Act.[1]

I do not concur with the reasoning of the majority statement. It appears to be based on what the majority hopes it would find if a hearing were held on the subject motion. Specifically, we should not allow an institutional guilt complex regarding the improprieties that have attended past issuance and use of Section 7 temporary certificates to warp our present understanding of the true legal character of that device.[2]

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[1] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 at 388 (1959).

[2] See our previous understanding on this point as set forth at page 110 of Opinion No. 351, issued January 22, 1962, 27 FPC 96.

The concurring statement of Commissioner Ross fully reflects my views in this matter.

Ross, *Commissioner*, concurring:

I concur with the action of my colleagues in denying the instant motion. This separate statement is necessitated by the failure of the majority to take this occasion to remind industry of the true nature and legal character of temporaries in view of the abuses which have occurred in this area.

Since the earliest days of producer regulation, temporary authorizations permitting the interstate sale of gas have been granted in emergency situations in which expeditious action was required. This practice rapidly expanded to situations where the "emergency" was not particularly acute. Once granted by the Commission and accepted by the producer, the terms of the temporaries were rarely—if ever modified. Temporary authorization quickly became the mode of producer regulation under Section 7 of the Natural Gas Act, and this situation persists today.[1]

Producers began to view the temporary authorizations as the final word regarding the terms under which their sales would be made, and the Commission took no direct action which could be construed as being inconsistent with this belief. The oppositions to the instant motion, for example, mirror the producers' attitude that a temporary authorization, once accepted, represents virtually an unchallengeable and immutable right to sell gas under the terms of the temporary.

In view of this history, I do not consider it desirable to amend the authorizations here in question. However, I can find no justification for reinforcing the fictitious claim that

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[1] In my partial dissent in *Tenneco Oil Co.*, Docket No. CI63-334, *et al.*, I noted that of 2880 temporary certificates granted in the last two years, only 31 had been superseded by permanent certificates.

a temporary somehow acquires an aspect of permanence—a notion which is legally unsound, and one which involves the possibility that excessive prices will receive continued sanction resulting in unjust enrichment to the producers.

Temporary authorizations are supposedly granted in emergency situations in order to avoid the delay involved in a detailed inquiry. They are granted summarily, without notice of hearing. As such, they represent a concession to producers to the possible detriment of their purchasers. While an application for rehearing may be filed (the producers even would have us reject this), this hardly measures up to our traditional concept of justice, which assumes that interested parties will have a right to state their positions before—not after—decision is made.[2] It is crystal clear to me, as it was to this Commission twelve months ago, that temporary authorizations are subject to change on the same basis as that on which they are granted. In the remanded CATCO case, this Commission held:

> Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines that conditions under which a permanent certificate shall be issued. [*Continental Oil Company, et al.*, Docket No. G-11024, *et al.*, Opinion No. 351, 27 FPC 96 at p. 110]

I can find no justification for joining the majority in its purported retreat on this point. Rather than retreat, the

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[2] An essential element of due process is an opportunity to be heard before the reaching of a judgment. Judgment without an opportunity to be heard is judicial oppression. *WJR, The Goodwill Station, Inc.* v. *F.C.C.*, 174 F. 2d 226, 233 (1948) citing the principal found in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581 (Webster's argument) (1819), and in *Gaplin* v. *Page*, 18 Wall. 350, 368 (1873).

instant motion presents an excellent opportunity for us to emphasize the essentially transient nature of temporaries, consistent with our holding in *CATCO, supra.*

The necessity for firmly adopting such a policy is manifest. Only five months ago, we found the in-line price in Texas Railroad District No. 4 to be 15¢, at least as of September 28, 1960.[3] It is difficult to conceive that the in-line price with respect to the contracts here involved has escalated since that time to 18¢, an increase of 20 percent. Yet the majority closes its eyes to this significant determination, and not only denies the relief requested, but goes further and voices its determination to perpetuate the conditions under which excessively high prices will be charges again and again without providing for recoupment down to the proper level. Fearing that its action might be misconstrued, the majority, in what is clearly dicta on page 220, indicates that it will not normally impose refund conditions in initial temporary authorizations at the ceiling price levels.

In my opinion, there is no rational basis for such a position. For one thing, it is obvious that all of the reasons cited in the majority's order for refusing to impose the requested refund conditions are clearly inapplicable to situations in which we would be considering an initial application for temporary authorization. The majority's apparent rationale for this position is found in its statement that it balances the competing interests of industry and the consumer by limiting temporary authorizations to prices established in the Statement of General Policy, and by providing for no rate increases during the term of temporary authorization. However, the prospect of limiting producer prices to the applicable ceiling is small consolation to the consumer when he is convinced—and with justification—that several of the ceilings are unjustifiably high.

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[3] *Skelly Oil Co.*, Docket No. G-18638, *et al.*, Opinion No. 362, 28 FPC 401 (issued August 30, 1962).

In summary, I am compelled to voice my disagreement with the majority's apparent insistence to regulate producer prices, in the important interim period pending the establishment of just and reasonable rates, by means of temporary authorizations, and on as summary a basis as possible. In my opinion, initial prices of producers should be governed by permanent certificates. To the extent that temporaries are granted, they should be subject to change on an *ex parte* basis, particularly when it is evident that the price is either too high or too low.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1134

THE UNITED GAS IMPROVEMENT COMPANY, PETITIONER

v.

SUNRAY DX OIL COMPANY, ET AL.

No. 1135

THE BROOKLYN UNION GAS COMPANY, ET AL.,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

In the administrative proceeding out of which these cases arise, the Federal Power Commission issued a number of certificates of public convenience and necessity authorizing the sale of natural gas from fields in the Texas Gulf Coast area. In its decision, the Commission (1) determined that the maximum price at which the gas could be sold pending the determination of just and reasonable rates was 16 cents per

257-562—67

Mcf, and (2) reserved for later decision the question whether the producers should be ordered to refund certain excessive charges which they had collected during a period of temporary authorization. On judicial review, the Court of Appeals for the Tenth Circuit upheld the issuance of the certificates at the 16 cent price, but reversed the Commission on the refund question, holding that the Commission was without power to order refunds because it had failed to expressly warn the producers of such a liability in issuing the temporary certificates. Our petition for a writ of certiorari to review the latter aspect of the court's judgment is before this Court in *Federal Power Commission* v. *Sunray DX Oil Co.*, No. 1133, this Term.

By the instant petitions, consumer interests affected by the sales in question seek review not only of the refund issue but also of the propriety of the 16 cent in-line price, which they contend is too high. For the following reasons, we agree that an unrestricted grant of certiorari, which would bring both issues before this Court, would be appropriate.

1. The decision below upholding the in-line price of 16 cents per Mcf is inconsistent with a recent decision of the Court of Appeals for the District of Columbia Circuit. *Public Service Commission of New York* v. *Federal Power Commission*, Nos. 19796 *et seq.*, decided February 7, 1967 (reprinted in Pet. No. 1135, App. C). That case holds that the Commission, in establishing an in-line price, may not consider any prices other than those for comparable sales which have been permanently certificated by the Commission

and either upheld on judicial review or not challenged. This approach, which in the Commission's view improperly freezes the price line at the level the consumer interests are willing to accept, led the District of Columbia Circuit to invalidate a 16 cent in-line price in certificates also involving the Texas Gulf Coast area—the very price upheld by the court below. See, also, *Pan American Petroleum Corp.* v. *Federal Power Commission,* C.A. 10, Case Nos. 7912 *et seq.,* decided March 9, 1967.

2. The issue is undoubtedly one of substantial importance. Although the area-rate approach which the Commission has adopted may eventually obviate the necessity of establishing in-line prices by the criteria here employed, no area rate has yet been finally approved; at best, several years must elapse before the new technique is fully implemented. In the interim, the question at bar of the proper standards for in-line prices will continue to arise.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

APRIL 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL POWER COMMISSION, *Petitioner,*

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL., *Respondent.*

BRIEF OF RESPONDENT STANDARD OIL COMPANY OF TEXAS IN OPPOSITION

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May 5, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1227

FEDERAL POWER COMMISSION, *Petitioner,*

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL., *Respondent.*

BRIEF OF RESPONDENT STANDARD OIL COMPANY OF TEXAS IN OPPOSITION

OPINIONS BELOW

The opinions and orders below, with the exception of the Commission's order issued on February 5, 1963 (29 F.P.C. 218), are set forth at Appendices A and B of the Federal Power Commission's petition herein and at Appendix C of the Commission's petition in No. 1133, October Term, 1966 (hereinafter called the *Sunray* Petition). The Commission's order of February 5, 1963, is printed as Appendix A to this brief (App. A, *infra*, pp. 1a-9a).

QUESTION PRESENTED

The Commission issued to respondent Standard Oil Company of Texas (hereinafter called "Sotex") temporary certificates authorizing sales of natural gas at prices conforming to the level of rates prescribed in the Commission's Statement of General Policy No. 61-1 (24 F.P.C. 818). These temporary certificates contained no condition or requirement respecting the making of refunds of prices collected for sales thereunder. No judicial review of these certificates was sought. Thereafter, in a contested proceeding, the Commission issued an order holding that no amounts collected under the temporary certificates would be required to be refunded. No judicial review of this order was sought. Three years later the Commission ordered Sotex to refund approximately 2 cents per Mcf of the 18 cent price collected under the temporary certificates. The question presented is whether, under the circumstances affecting these certificates, the Commission's refund order is valid.

STATEMENT

The Commission, after approximately two months deliberation in each case, issued two conditional temporary certificates to Sotex. In both cases the proposed initial price was required to conform to the 18 cent per Mcf price level then specified in the Commission's Statement of General Policy No. 61-1 (24 F.P.C. 818).[1] Since the 18 cents per Mcf to be collected under both temporary certificates was in accordance with the Com-

[1] In one case Sotex's proposed initial price of 19.795 cents was reduced to 18 cents. In the other case the proposed initial price was 18 cents per Mcf, but the Commission declared inoperative a contractual price escalation clause.

mission's published official guideline, the certificates did not contain any contingent refund conditions. No judicial review of these certificates was sought.[2] Sotex accepted the temporary certificates thus conditioned and, in reliance thereon, commenced deliveries.

The United Gas Improvement Company, Philadelphia Electric Company and Long Island Lighting Company, all of whom are petitioners in the companion cases before this Court, Nos. 1134 and 1135, had actual notice of the issuance of the temporary certificates. In November, 1962, they moved the Commission to revoke the certificates or to impose upon them a contingent refund condition. The Commission, on February 5, 1963, denied the motion, holding that the 18 cent price specified in the temporary certificates was firm until permanent certification and that such price was not subject to retroactive refund liability.[3] The intervenors did not seek judicial review of this order.

Thereafter, on March 23, 1964, the Commission issued permanent certificates conditioned to 16 cents per Mcf (31 F.P.C. 623). Sotex reduced its price to the prescribed 16 cents and does not, in this case or in the companion cases before this Court, challenge this inline price.

In July of 1966, the Commission finally issued further orders (the subject of this case), ostensibly denominated as "conditions" to the permanent certificates issued two years earlier, requiring Sotex to re-

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[2] Temporary certificate orders are final orders which must be reviewed within the time provided by Section 19(b) of the Natural Gas Act. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (CA 5, 1961).

[3] The order of the Commission is printed as Appendix A to this brief.

fund with interest nearly 2 cents of the 18 cent price which the Commission had authorized in accordance with its Policy Statement and which it had held, by its final order of February 5, 1963, not to be subject to any refund obligation.

REASONS FOR DENYING THE WRIT

In its petitions in this case and in the companion *Sunray* case (No. 1133) the Commission seeks to present to this Court the broad hypothetical question as to whether under any circumstances it has "power" to order refunds with respect to sales of natural gas made under temporary certificates which do not contain conditions requiring the making of such refunds. It asserts that this question is important because it is presented in numerous pending cases involving large sums of money. It further contends that the decision of the court below is in conflict with the *Skelly* decision of the Court of Appeals for the District of Columbia Circuit,[4] and with the decision of this Court in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

Contrary to the Commission's contention, the issue in this case is narrow in scope. Putting aside facts peculiar to any individual sales, the circumstances surrounding the issuance of temporary certificates by the Commission can be grouped into three broad classes:

(1) Temporary certificates issued before promulgation of guideline prices;

(2) Temporary certificates issued after the promulgation of, and therefore affected by, guideline prices; and

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[4] *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963.

(3) Temporary certificates issued at or below a guideline price and held by final order of the Commission after adversary proceeding to authorize a firm price not subject to refund.

The temporary certificates in this case fall in the third category. So far as we can determine, other than the sales involved in this case, only six sales out of the hundreds for which the Commission has issued temporary certificates are in this category. In these circumstances the reasons advanced by the Commission in support of the writ are not persuasive.

(a) *Alleged conflict with Skelly.* The temporary certificates issued in *Skelly* were issued before the Commission had embarked on its program of holding the line of initial prices by prescribing the guideline prices contained in its Policy Statement No. 61-1, and before its broad scale institution of initial in-line price certificate proceedings. The *Skelly* temporaries were not, as in this case, conditioned upon the reduction of the proposed initial prices to the level of the guideline price, and had not, as in this case, been the subject of reconsideration in a contested proceeding which resulted in a final order holding that the prices were firm and not subject to refund. Further, *Skelly* recognized that the Commission should not order refunds, even as to temporary certificates issued before the promulgation of the guideline prices, contrary to the equities in a particular case. As the opinions of the court below so strongly point out, the equities in this case which were considered by the court compel the setting aside of the Commission's refund orders.

(b) *Alleged conflict with Callery.* In *Callery* this Court held that the Commission could order refunds of sums collected pursuant to certificates "which never

became final" (382 U.S. 223, 229). Lack of finality occasioned by the institution of timely review proceedings was the crux of the decision. In the present case, each of the temporary certificates and the rates collected thereunder were affected by two final orders. Both the orders issuing the temporary certificates and the later order declaring that refunds would not be required (Appendix A) were appealable. Neither was challenged, and each became final.

(c) *Importance.* We have noted that the case at bar and a few similar sales involved in one other case [5] present unique facts. These few sales must properly be distinguished from the large number of sales the Commission cites in an effort to demonstrate the importance of this case.

Beyond this, even the hypothetical question posed by the Commission has long since lost its importance. An examination of the Commission's workpapers relating to its claim that there are some 479 existing temporary certificates "in which the identical issue may arise" (Petition No. 1133, p. 8) reveals that the vast majority of those temporary certificates prescribe prices which are either at or below the current in-line price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed in-line prices. In addition, the Commission's workpapers indicate that since the middle of 1964, the Com-

[5] See Order of February 5, 1963 in Area Rate Proceeding, Docket No. AR61-2, 29 F.P.C. 223. Of the 24 sales affected by that Order, all but six have been finally disposed of by settlement or otherwise.

mission has followed the policy of inserting express refund conditions in temporary certificates authorizing interim sales at prices higher than those prescribed in previously determined in-line certificate proceedings.

And finally, the Commission, by its Order No. 336, issued on February 9, 1967 (Appendix B, *infra,* pp. 10a-12a), has ordered that henceforth all temporary certificates shall contain express refund conditions fixed at a level 2 cents below the previously determined in-line or guideline price (whichever is lower) for the area involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 5, 1967

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544, *et al.*

Order Denying Motion to Impose Price Conditions in Temporary Certificates

(Issued February 5, 1963)

On November 29, 1962, the Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company (Movants) filed a motion requesting that the Commission vacate the temporary certificates issued to the various party-applicants to the above-entitled proceeding or, in the alternative, impose a condition in each of these temporaries, requiring that the applicant refund to the purchaser, with interest at 7% per annum, any amounts hereafter collected which may be determined to be in excess of the price required by the public convenience and necessity under each applicant's respective certificate docket.

Each of the producers herein except Sun Oil Company in Docket No. CI62-276 have been granted temporary authority to make sales in interstate commerce. In almost every instance the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. Sales of gas were commenced by each of the producers pursuant to and in reliance upon the temporary authority.

Essentially the motion constitutes an application for rehearing of the Commission's Letter Orders issuing temporary authorizations to certain of the producers herein. Section 19(a) of the Natural Gas Act provides that an application for rehearing must be submitted within 30 days following the issuance of an order. The motion herein was not submitted within the statutory 30-day period following the issuance of the temporary authorizations. There is no question that such temporary authorizations constitute appealable orders and, therefore rehearing should be sought within 30 days. However, we recognize that the letter orders issuing the authorizations were unreported, although copies thereof were available to the public. We shall not, therefore, dismiss the motion as being untimely. However, for the reasons hereinafter set forth, we must deny the motion to terminate the existing temporary authorizations.

Section 7(c) of the Natural Gas Act empowers the Commission to issue temporary certificates when emergency situations exist. We have promulgated regulations recognizing certain situations which constitute emergency situations as to independent producers. See regulations under the Natural Gas Act, Section 157.28.[1] Each of the producers who requested the issuance of temporary authorization to sell gas set forth an emergency situation which, under our regulations, permitted the issuance of such authority. Temporary certificates were therefore issued. Movants would now have us withdraw the existing authority and proffer to each producer a new temporary certificate conditioned to meet the requested requirements, giving each producer the opportunity to reject such temporary authority. Movants ignore the fact that the pro-

[1] Also see order denying applications of New York Commission for rehearing and reconsideration and motion for a stay issued December 31, 1962, in *J. Ray McDermott, et al.*, Docket Nos. CI63-301, *et al.*

ducers and pipelines here involved have already acted upon the temporary authorizations as issued and have undoubtedly expended considerable funds in justifiable reliance thereon. Apparently Movants have also ignored the dependence of pipelines and their customers upon continued service once a reservoir of natural gas begins flowing into interstate lines. To now offer the producers an opportunity to reject a substituted temporary certificate, conditioned to provide for refunds down to the price to be fixed after the Section 7 hearing we have ordered, would clearly be contrary to the public interest. It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas.

Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. This we will not do. Assuming, without deciding, that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with "such certainty as to allow the exercise of choice upon [the producers'] part." Sunray *Mid-Conti-*

nent Oil Company v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy.

While this case relates to the imposition of refund conditions in temporary authorizations already issued, we do not wish our determination here to be construed as indicating that we will normally impose such a condition if the applications for temporary authority were before us for the first time. On the contrary, as we made clear in our order in *J. Ray McDermott, supra,* in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate. Our policy in this respect was clearly set forth in the Fourth Amendment to our Statement of General Policy No. 61-1 in which we reduced the Southern Louisiana ceiling and observed that the Commission's interim ceilings represent the Commission's judgment of a ceiling which "will enable the Commission to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas."

In view of these circumstances we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates issued to the above-mentioned producers as requested by Movants.

The Commission orders:

The request made by the Long Island Lighting Company, Philadelphia Electric Company and the United Gas Improvement Company either to have the temporary certificates issued to the party applicants to the above-styled proceedings vacated or, in the alternative for the imposition of a condition in each of these temporaries be and hereby is denied.

By the Commission. Commissioners Morgan and Ross concurring, filed separate statements appended hereto.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544, *et al.*

(Issued February 5, 1963)

MORGAN, Commissioner, *concurring:*

I concur only in the result.

Unfortunately, past indiscretions committed by this Commission in the matter of granting temporary certificates do not permit us now, in good grace, summarily to grant relief sought by the consuming public.

I therefore limit myself to the hope that proceedings on the merits of this matter will soon be concluded; and that the rates in question will be adjusted, where necessary, to correspond to the "lowest possible reasonable rate" required by the Act.[1]

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[1] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 at 388 (1959).

I do not concur with the reasoning of the majority statement. It appears to be based on what the majority hopes it would find if a hearing were held on the subject motion. Specifically, we should not allow an institutional guilt complex regarding the improprieties that have attended past issuance and use of Section 7 temporary certificates to warp our present understanding of the true legal character of that device.[2]

The concurring statement of Commissioner Ross fully reflects my views in this matter.

HOWARD MORGAN
Howard Morgan, *Commissioner*

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544, *et al.*

(Issued February 5, 1963)

Ross, Commissioner *concurring:*

I concur with the action of my colleagues in denying the instant motion. This separate statement is necessitated by the failure of the majority to take this occasion to remind industry of the true nature and legal character of temporaries in view of the abuses which have occurred in this area.

Since the earliest days of producer regulation, temporary authorizations permitting the interstate sale of gas have been granted in emergency situations in which expeditious action was required. This practice rapidly expanded to situations where the "emergency" was not particularly acute. Once granted by the Commission and accepted by

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[2] See our previous understanding on this point as set forth at mimeo. page 19 of Opinion No. 351, issued January 22, 1962.

the producer, the terms of the temporaries were rarely—if ever modified. Temporary authorization quickly became the mode of producer regulation under Section 7 of the Natural Gas Act, and this situation persists today.[1]

Producers began to view the temporary authorizations as the final word regarding the terms under which their sales would be made, and the Commission took no direct action which could be construed as being inconsistent with this belief. The oppositions to the instant motion, for example, mirror the producers' attitude that a temporary authorization, once accepted, represents virtually an unchallengeable and immutable right to sell gas under the terms of the temporary.

In view of this history, I do not consider it desirable to amend the authorizations here in question. However, I can find no justification for reinforcing the fictitious claim that a temporary somehow acquires an aspect of permanence—a notion which is legally unsound, and one which involves the possibility that excessive prices will receive continued sanction resulting in unjust enrichment to the producers.

Temporary authorizations are supposedly granted in emergency situations in order to avoid the delay involved in a detailed inquiry. They are granted summarily, without notice of hearing. As such, they represent a concession to producers to the possible detriment of their purchasers. While an application for rehearing may be filed (the producers even would have us reject this), this hardly measures up to our traditional concept of justice, which assumes that interested parties will have a right to state

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[1] In my partial dissent in *Tenneco Oil Co.*, Docket Nos. CI63-334, *et al.* I noted that of 2880 temporary certificates granted in the last two years, only 31 had been superseded by permanent certificates.

their positions before—not after—decision is made.[2] It is crystal clear to me, as it was to this Commission twelve months ago, that temporary authorizations are subject to change on the same basis as that on which they are granted. In the remanded CATCO case, this Commission held:

> "Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines that conditions under which a permanent certificate shall be issued."
>
> (*Continental Oil Company, et al.*, Docket Nos. G-11024, *et al.*, Opinion No. 351, p. 19)

I can find no justification for joining the majority in its purported retreat on this point. Rather than retreat, the instant motion presents an excellent opportunity for us to emphasize the essentially transcient nature of temporaries, consistent with our holding in *CATCO, supra.*

The necessity for firmly adopting such a policy is manifest. Only five months ago, we found the in-line price in Texas Railroad District No. 4 to be 15¢, at least as of September 28, 1960.[3] It is difficult to conceive that the in-line price with respect to the contracts here involved has escalated since that time to 18¢, an increase of 20 per cent. Yet the majority closes its eyes to this significant determination, and not only denies the relief requested, but

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[2] An essential element of due process is an opportunity to be heard before the reaching of a judgment. Judgment without an opportunity to be heard is judicial oppression. *WJR, The Goodwill Station, Inc.* v. *F.C.C.*, 174 F. 2d 226, 233 (1948) citing the principal found in *Dartmouth College* v. *Woodward* 4 Wheat. 518, 581 (Webster's argument) (1819), and in *Gaplin* v. *Page* 18 Wall. 350, 368 (1873).

[3] *Skelly Oil Co.*, Docket Nos. G-18638, *et al.*, Opinion No. 362.

goes further and voices its determination to perpetuate the conditions under which excessively high prices will be charges again and again without providing for recoupment down to the proper level. Fearing that its action might be misconstrued, the majority, in what is clearly dicta on page 3, indicates that it will not normally impose refund conditions in initial temporary authorizations at the ceiling price levels.

In my opinion, there is no rational basis for such a position. For one thing, it is obvious that all of the reasons cited in the majority's order for refusing to impose the requested refund conditions are clearly inapplicable to situations in which we would be considering an initial application for temporary authorization. The majority's apparent rationale for this position is found in its statement that it balances the competing interests of industry and the consumer by limiting temporary authorizations to prices established in the Statement of General Policy, and by providing for no rate increases during the term of temporary authorization. However, the prospect of limiting producer prices to the applicable ceiling is small consolation to the consumer when he is convinced—and with justification—that several of the ceilings are unjustifiably high.

In summary, I am compelled to voice my disagreement with the majority's apparent insistence to regulate producer prices, in the important interim period pending the establishment of just and reasonable rates, by means of temporary authorizations, and on as summary a basis as possible. In my opinion, initial prices of producers should be governed by permanent certificates. To the extent that temporaries are granted, they should be subject to change on an *ex parte* basis, particularly when it is evident that the price is either too high or too low.

CHARLES R. ROSS
Charles R. Ross, *Commissioner*

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR 2.63)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. R-316

REFUND CONDITIONS IN TEMPORARY CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY ISSUED TO INDEPENDENT PRODUCERS OF NATURAL GAS

Order No. 336

Statement of General Policy

(Issued February 9, 1967)

By decision issued January 23, 1964, the United States Court of Appeals for the District of Columbia Circuit held that the Commission had power, in the issuance of permanent certificates to independent producers of natural gas, to require refunds of all or a portion of excess amounts collected under temporary certificates granted without express refund conditions. *Public Service Comm.* v. *FPC*, 329 F. 2d 242, *cert. denied sub nom. Prado Oil Co.* v. *FPC*, 377 U.S. 963 (1964).

By a decision issued December 9, 1966, the United States Court of Appeals for the Tenth Circuit held that refunds could not be ordered under temporary certificates lacking express refund conditions, thereby creating an apparent conflict with the decision of the District of Columbia Circuit. *Sunray-DX Oil Company* v. *FPC*, Nos. 7781 *et al.*, ... F. 2d ....

In view of this situation and for the purpose of protecting consumers from "out-of-line" rates, the Commission

has determined as a matter of policy to include an express refund condition in temporary certificates hereafter issued to independent producers of natural gas authorizing sales in areas where just and reasonable rates have not been determined. This policy will be maintained until the apparent conflict between the decisions of the Courts of Appeal is resolved.

The Commission finds:

(1) The statement issued herein concerns a matter of general policy which does not require notice or hearing under section 4(a) of the Administrative Procedure Act.

(2) It is appropriate and in the public interest in administering section 7 of the Natural Gas Act to set forth the Commission policy with respect to the matter here under consideration.

The Commission, acting under the authority of the Natural Gas Act, as amended, particularly sections 7(c), 7(e) and 16 thereof (52 Stat. 825, 830; 56 Stat. 83; 15 U.S.C. 717f(c), 717(e), 717o), orders:

(A) Effective upon the issuance of this order, Part 2, General Policy and Interpretations, Chapter I, Title 18 of the code of Federal Regulations is amended by adding a new § 2.63 to read as follows:

§ 2.63 *Express refund conditions in certain temporary certificates of public convenience and necessity issued to independent producers of natural gas.*

For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended

(§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower, together with a proportional adjustment for Btu's of less than 1000 per cubic foot, measured on a wet basis.

(Secs. 7, 16, 52 Stat. 825, 830; 56 Stat. 83; 15 U.S.C. 717f(c), 717f(e), 717o)

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 80

FEDERAL POWER COMMISSION,

Petitioner,

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, *et al.*,

Respondents.

No. 97

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner,

v.

SUNRAY DX OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC. AND CLARK FUEL PRODUCING COMPANY

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Tenth Circuit setting aside the Commission's Opinion Nos. 501 and 501-A directing refunds and the Tenth Circuit's opinion on rehearing are reported at 376 F. 2d 578, 580, and are printed as App. A, *infra*. The opinions and orders of the Commission directing refunds are not yet reported.

They are printed in App. C to the Commission's pending petition in *Federal Power Commission* v. *Sunray DX Oil Co., et al.*, No. 60 (O.T. 1967).

JURISDICTION

The judgments of the court below were entered on March 27, 1967 (No. 80, App. B, pp. 14-21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The "Question Presented" by No. 80 (O.T. 1967) and Question No. 1 presented by No. 97 (O.T. 1967) seek review of the Tenth Circuit's determination in the case below that the Commission lacked the power, in the circumstances presented, to require retroactively the refund of amounts collected pursuant to temporary certificates which contained no refund obligations. The court below has previously determined that the Commission lacked such refund power in the identical circumstances when it reviewed the Commission's Opinion Nos. 422 and 422-A[1] in *Sunray DX Oil Company, et al.* v. *Federal Power Commission*, 370 F.2d 181 (10th Cir. 1966). Petitions for writs of certiorari seeking review of that question have been filed by these same Petitioners in the *Sunray* litigation (Nos. 60 and 61, O.T. 1967). Respondents have filed answers in opposition to those petitions. This question, presented here and in *Sunray* is:

> May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, pursuant to legal precedent and its established policies, the Commission determined both

[1] *Amerada Petroleum Corporation, et al.*, Opinion Nos. 422 and 422-A, 31 FPC 623 and 1315 (1964).

at the time of issuance of such certificates and upon subsequent reconsideration that no refund liabilities should be imposed?

The additional question purportedly reserved for argument by footnote reservation in No. 80 (p. 4, fn. 1) and raised by Question No. 2 in No. 97 concerns the reasonableness of the Commission's *exercise* of the disputed refund power in its Opinion Nos. 501 and 501-A. In its decision below, the Tenth Circuit did not reach this question in view of its determination in *Sunray* that the Commission lacked a retroactive refund power in the circumstances. The Tenth Circuit made clear, however, that if its disposition of the refund power question were ultimately held to be in error, it is ready to consider the many complex questions, both equitable and legal in nature, which have been raised below concerning the propriety of the Commission's exercise of such power.

The issues encompassed in the question of the Commission's exercise of an asserted refund power were not briefed, argued, reviewed or decided by the court below. Petitioners' extraordinary request that this Court review in the first instance the multi-issue question of whether the Commission reasonably exercised the disputed power would impose an unnecessary burden upon this Court[2] and would

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[2] It should be noted that eleven separate petitions to review were filed with the court below. Uniformly, these petitions questioned not only the Commission's legal authority to order refunds, but also raised numerous and complex subsidiary questions concerning the manner in which the Commission had exercised its claimed authority. These subsidiary questions were not briefed or argued before the court below because of its summary disposition of the primary question. In the event that the Court deems the second question to be properly raised at this time, then the numerous and complex subsidiary questions enumerated in the various petitions filed with the court below must be regarded as encompassed within the question of whether the Commission reasonably exercised the disputed refund power.

disrupt the orderly procedure established by Congress for judicial review of Commission orders under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTE INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act are set forth in the Commission's petition (No. 80, pp. 2-3). The pertinent portion of Section 19(b) of the Act is as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain the review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254)."

STATEMENT

The basis for decision of the court below is that court's prior decision in *Sunray DX Oil Company, et al.* v. *Federal Power Commission,* 370 F. 2d 181 (1966). The *Sunray* decision reviewed the Commission's Opinion Nos. 422 and 422-A issuing permanent certificates of public convenience and necessity authorizing sales of natural gas from Texas Railroad Commission District No. 4 by certain independent producers, including Respondents. In those opinions, the

Commission held that it possessed the power to require refunds of amounts previously collected under lawful temporary certificates, but deferred the exercise of such asserted authority pending further analysis of the equitable considerations involved. In *Sunray* the court below affirmed the administrative authorization of these sales prospectively at a price of 16 cents per Mcf but held that the Commission lacked the power to require on a retroactive basis the refunding of any amounts collected by Respondents pursuant to lawful temporary certificates previously granted by the Commission.

Shortly before the decision of the court below in *Sunray*, the Commission issued its Opinion Nos. 501 and 501-A by which it imposed specific refund obligations upon Respondents in accordance with its prior holding asserting the power to impose such refunds. In per curiam disposition of Respondents' appeals of Opinion Nos. 501 and 501-A, the court below relied upon its prior determination in *Sunray* on the refund question and set aside those opinions of the Commission. The petitions filed here in Nos. 80 and 97 followed. As a consequence, the question of the Commission's power to impose refunds raised in Nos. 80 and 97 merely duplicates the question already raised by the same Petitioners in Nos. 60 and 61 (O.T. 1967) which are now pending before this Court.[3]

On the premise, held to be erroneous in *Sunray*, that it possessed the power to impose retroactively a refund requirement in these circumstances, the Commission in its Opinion Nos. 422 and 422-A established a procedure for determining the extent of the refunds. Although Respondents moved the Commission for an evidentiary

[3] The third petition (No. 62, O.T. 1967) seeking review of the refund power question in *Sunray* was filed by The Brooklyn Union Gas Company, *et al.* This group has not filed a petition seeking review of the decision below.

hearing on the latter question, this was denied by the Commission. By its Opinion Nos. 501 and 501-A, the Commission purported to accept the many factual allegations made by various Respondents demonstrating why refunds should not be ordered, but nevertheless determined that unspecified equitable considerations required Respondents to make substantial refunds of amounts previously collected under their temporary certificates.

As previously indicated, the court below did not reach the numerous issues raised by Respondents concerning the impropriety of the Commission's exercise of a claimed refund power. However, it made clear that it would reach that question when and if its determination on the refund power question were held to be erroneous. Thus, in its opinion on rehearing, the court below stated:

> "* * * We adhere to our view that we are not concerned with the exercise of a non-existent [refund] power. If it should be held on Supreme Court review that we are wrong as to the existence of the power, we are ready to consider then the manner of the exercise of the power" (App. A, *infra*, p. 6a; 376 F. 2d 578 at 581).

This approach was wholly consonant with the position pressed below by the Commission. Prior to the decision below, the Commission moved to sever and summarily decide the refund power question on the basis of the prior *Sunray* decision of the court below.[4] Essentially, this is what the court below has done.

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[4] In this regard, the Tenth Circuit observed in its decision below: "* * * The Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue because the same question was decided by our opinion in No. 7781, Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 370 F. 2d 181, which is now pending in the United States Supreme Court on the Commission's petition for certiorari * * *" (App. A, *infra*, p. 5a; 376 F. 2d 578 at 581).

REASONS FOR DENYING THE WRITS

The Question Of The Commission's Refund Power

Petitioners in Nos. 80 and 97 assert no further reasons for an on-the-merits review by this Court of the refund power question than they have previously asserted in their petitions in Nos. 60 and 61, respectively. This is understandable inasmuch as the Tenth Circuit in its decision below has reiterated its prior decision in *Sunray* on this issue. Respondents, therefore, adopt their answers in opposition on the refund power question filed in Nos. 60, 61 and 62 as their answers here.

However, the Commission does assert three procedural reasons for consolidating its petitions Nos. 60 and 80 for briefing and oral argument. Two of these reasons relate to the refund power question initially raised by it in No. 60. As reason No. 1, the Commission urges that a grant of certiorari in No. 60 and a subsequent reversal therein would leave the judgment below in this case "technically undisturbed" if certiorari is not also granted here (No. 60, p. 7). If this be a problem, it can be readily resolved by deferring action upon the petitions in Nos. 80 and 97 pending the final outcome of Nos. 60 and 61.

This is the identical procedure proposed by the Solicitor General in *Federal Power Commission* v. *Pan American Petroleum Corporation, et al.*, No. 227, October Term 1967. There, the Commission is also attacking a *Sunray*-based holding by the Tenth Circuit and is requesting that its petition in *Pan American* "be held to abide the final disposition" of its petition in No. 60. Speaking for the Commission, the Solicitor General has recently described the Court's normal practice in a comparable situation as follows:

> "* * * The Court's normal practice, where a petition raises the same issue involved in a pending case, is to defer action on the petition until the pending case is decided and then dispose of the petition summarily in conformity with its decision. We see no persuasive reason for departing from this practice in the present case — especially since this may be but the first of several additional petitions raising the *Sunray* issue that may soon be before the Court * * *" (Solicitor General's pending petition in No. 144, O.T. 1967, captioned *F.P.C.* v. *Public Service Commission of N.Y., et al.*).

As reason No. 2, the Commission suggests that a consolidation of No. 80 and No. 60 "would serve to obviate any possible question as to whether the [refund power] issue is ripe for review" (No. 80, p. 7). The court below gave careful consideration to this issue in its *Sunray* decision, the subject matter of No. 60, and concluded that the refund power issue was reviewable. In No. 60, the Commission has agreed with the Tenth Circuit's conclusion (No. 60, pp. 7-8, fn. 6). Consequently, this reason, an apparent makeweight, should not be seriously entertained.

The Question Of The Commission's Exercise Of The Disputed Refund Power

The second question which Petitioners present, *i.e.*, whether the Commission reasonably exercised the disputed refund power, is premature and should not be entertained by this Court.[5] That question was not decided below, con-

[5] The Rules of this Court do not permit the usurpation of this Court's function to determine the questions to be reviewed which the Commission seeks by its attempt to reserve additional questions in the event certiorari is granted. Rule 23(1)(c). Frequently, a grant of certiorari is limited to specific questions. *Irvine* v. *California*, 347 U.S. 128, 129 (1954). In the event certiorari is granted in Nos. 80 and 97, we urgently request that the Court make clear whether or not it wishes the parties to brief and argue all of the various issues not decided by the court below.

sonant with the Commission's representation that the refund power question was severable from the question of whether it had reasonably exercised that claimed power. Accordingly, the court below summarily decided the threshold question on the basis of its prior *Sunray* decision. In these circumstances, the court below did not reach the second question which the Petitioners now improperly ask this Court to review in the first instance.

Petitioners' third reason for consolidated review rests on a claim of judicial economy. On the contrary, consolidation would impose an unreasonable burden upon this Court and deprive the parties of the appellate review contemplated by the Natural Gas Act.

The Commission erroneously claims that this prematurely raised question "* * * involves no complexities or factual disputes of a kind which would counsel preliminary examination by the lower court * * *" (No. 80, p. 4, n. 1). However, it neglects to advise the Court that both the Commission and courts have uniformly recognized that after the determination of the threshold authority issue, the examination of numerous additional complex factors is required before a determination can be made of whether, how, and to what extent, such authority should be exercised.

The following are only a few examples of the many issues raised below by Respondents, but not passed upon by the court below:

1. Whether the Commission improperly denied Respondents the opportunity to present the following evidence demonstrating that the retroactive imposition of a refund condition on the sales at issue is contrary to the public convenience and necessity:

   a. The extent to which Respondents relied upon the unconditioned temporary certificates granted by the Commission in determining whether to dedicate their gas in interstate commerce.

b. The impact upon Respondents of requiring retroactive refunds.

c. The effect of the Commission's action upon the producing industry from the standpoint of planning, budgeting and financing future drilling and production activities.

d. The extent to which such refunds would actually reach the ultimate consumer.

2. Whether the Commission's conclusion that refunds should be required can be justified in light of its acceptance as fact of the following allegations:

a. that the ordering of refunds will have a substantially adverse effect upon the ability of natural gas producers to assure consumers of an adequate supply of natural gas.

b. that a substantial portion of the monies ordered to be refunded will never reach the ultimate consumer.

c. that the costs of making these sales exceeded the revenues received under the unconditioned temporary certificates.

3. Whether the record supports the Commission's reversal of its prior findings and order of February 5, 1963 holding that it would be contrary to the public convenience and necessity to require retroactive refunds in the circumstances presented.

4. Whether the Commission can properly impose upon Respondents an obligation to pay interest on amounts ordered refunded which were lawfully collected pursuant to valid temporary certificates.

In similar circumstances, this Court has often recognized the advantage to all concerned of a prior disposition by the court below of complex issues of this nature, especially in the case of judicial review of administrative decisions. As

recently as March 13, 1967, this Court in its opinion in *FPC* v. *United Gas Pipe Line Company, et al.*, ... U.S. ....., 18 L. ed 2d 18, reaffirmed that it does not consider it appropriate to decide in the first instance an issue "to which the Court of Appeals has not addressed itself" (18 L. ed 2d at 26). In *Federal Communications Commission* v. *W. J. R., The Goodwill Station, Inc.*, 337 U.S. 265 (1949), after noting that parties have a statutory right to an appeal to a United States Court of Appeals from orders of the FCC, the Court held at 285:

> "But since the statute, if it affords respondent a right of appeal, provides that it shall be to the court of appeals, and since that court has not decided the basic issue on the merits, we think the cause should be remanded to the court of appeals for decision of that question, uncomplicated by questions of constitutionality relating to the Commission's procedure."

In *Civil Aeronautics Board* v. *American Transport*, 344 U.S. 4 (1952), the Court held:

> "This court does not normally review orders of administrative agencies in the first instance; and the court does not desire to take any action at this time which might foreclose the possibility of such review in the court of appeals."

See also *Abbott Laboratories, et al.* v. *Gardner*, ... U.S. ....., 18 L.ed.2d 681, 696; *Cory Corporation, et al.* v. *Sauber*, 363 U.S. 709, 712 (1960); *Salem* v. *United States Lines Company*, 370 U.S. 31, 38 (1962); and *U.S.* v. *Republic Steel Corporation*, 372 U.S. 482, 493 (1960).

The resolution of the question regarding the unreasonableness of the Commission's exercise of the disputed refund power in the circumstances of this case is not of such urgency as to justify the extraordinary deviation from normal Federal Appellate processes requested by Peti-

tioners.[6] Moreover, this litigation would not be terminated by review of such questions at the present time. A decision adverse to Respondents would only result in further proceedings before the Commission concerning the question of a flow-through by the pipeline purchasers of the refunds imposed upon Respondents. *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 357 F.2d 352 (5th Cir. 1966); *United Fuel Gas Co.* v. *Federal Power Commission,* 367 F.2d 34 (4th Cir. 1966). Therefore, it is apparent that a radical departure from traditional review procedures is unwarranted, particularly when this Court's disposition of the refund power question in Nos. 60 and 61 may render these additional issues moot.

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[6] Such deviation is not contemplated by the appellate procedures prescribed by Section 19 of the Natural Gas Act. Moreover, Rule 20 of this Court requires that a case must be of "impending public importance" to justify a by-passing of the decisional process in the court of appeals. Petitioners have not invoked Rule 20, nor have they furnished support for its invocation.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied. In the event that the Court should grant the petitions filed by these same Petitioners in Nos. 60 and 61 and the companion petition in No. 62, the petitions in Nos. 80 and 97 should be held to abide the Court's final disposition in Nos. 60, 61 and 62.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 9289, March Term, 1967

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; TEXACO INC.; SUNRAY DX OIL COMPANY; HUMBLE OIL & REFINING COMPANY; LAMAR HUNT; SOHIO PETROLEUM COMPANY; AND SUN OIL COMPANY, INTERVENORS

Filed March 27, 1967
Rehearing Denied May 18, 1967

On Petition to Review Orders of the Federal Power Commission

Before BREITENSTEIN, HILL, and SETH, Circuit Judges.

Per curiam

This petition seeks review of Federal Power Commission Opinions Nos. 501 and 501-A which require the petitioner and other independent producers, all of whom were parties to the consolidated proceedings styled Amerada Petroleum Corporation, et al., Docket Nos. C162 etc., to make refunds of amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422.

Opinion No. 501 was entered while proceedings were pending before us for the review of Opinion No. 422. We

disposed of the latter opinion and its accompanying orders in Nos. 7781 etc., *Sunray DX Oil Company, et al.* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181:

In that Sunray DX decision we pointed out that the threat of refund orders inherent in Opinion No. 422 had been followed by the action taken in Opinion No. 501; that the refund question was ripe for judicial determination; and that "proper judicial administration requires that it be deferred no longer." We held that, absent considerations not there present, refunds may be ordered under § 7 only when a producer contractully undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

Our decision on the refund issue was reaffirmed in Nos. 7912 etc., *Pan American Petroleum Corporation, et al.,* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——.

The petition for review now before us attacks Opinions Nos. 501 and 501-A on the grounds that the Commission lacked the power to order the refunds and that the power, if existing, was not properly exercised. The Commission, without waiving its opposition to our disposition of the refund issue, has moved for the severance of the issue of power from the issue of exercise of that power and for the summary disposition of the power issue. The petitioner has moved that the court "enter its Per Curiam Decision vacating and setting aside, on the basis of Opinion issued December 9, 1966, [the Sunray DX decision] * * *, Respondent's Opinion Nos. 501 and 501-A and related Orders." The Commission filed a response to the petitioner's motion and, although reasserting its position on the merits, said that "it agrees to the proposed procedure for decision."

Petitions for certiorari to review our Sunray DX decision are now pending in the United State Supreme Court. See 35 LW 3323.

We have before us 10 other petitions to review Opinions Nos. 501 and 501-A. They are:

No. 9227 — Sunray DX Oil Company
No. 9287 — Patchin-Wilmoth Industries, Inc.
No. 9308 — Sohio Petroleum Company
No. 9310 — Texaco, Inc.
No. 9311 — Sun Oil Company
No. 9315 — Edwin L. Cox
No. 9316 — Humble Oil & Refining Company
No. 9317 — Lamar Hunt
No. 9318 — George H. Coates
No. 9319 — Clark Fuel Producing Company

By petitions in intervention heretofore granted, Texaco, Sunray DX, Humble, Hunt, Sohio, and Sun oppose both the motion of the Commission for a severance and the motion of Standard Oil Company of Texas for summary disposition. These intervenors assert that the grant of such motions would result in the improper fragmentation of appeals and would have the effect of depriving them of the right to be heard on the individual inequities arising from the manner in which the Commission has ordered refunds.

We are committed to the principle that the Commission has no power to order refunds when the temporary certificate contains no express refund provisions. Because we believe that the Commission lacks such power, we are not concerned with the exercise of the power. No good purpose would be served by granting the severance which the Commission proposes. The exercise of the power depends on the existence of the power. With commendable

frankness the Commission says that we are wrong in the Sunray DX decision on refunds and that it expects the error to be rectified in the certiorari proceedings which it has brought. When and if this occurs, the time will have arrived for us to consider the individual equities.

In the ten other petitions for review of Opinions Nos. 501 and 501-A we have no motion for summary disposition like that presented here by Standard Oil Company of Texas. All petitions should receive the same treatment. Accordingly, on our own motion, we are today deciding all ten of them on the basis of this decision.

The motion of the respondent for severance is denied. The motion of the petitioner for summary disposition is granted. On the authority of *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181, and *Pan American Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——, Opinions Nos. 501 and 501-A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

ON REHEARING

Per curiam.

The petitioners in Nos. 9227, 9287, 9308, 9310, 9311, 9315, 9316, 9317, 9318, and 9319 and the intervenors Texaco Inc., Sunray DX Oil Company, Humble Oil & Refining Company, Lamar Hunt, Sohio Petroleum Company, and Sun Oil Company in No. 9289 have filed petitions for rehearing asking that the judgments of reversal and remand entered on March 27, 1967, be vacated and that all the cases be held in abeyance pending Supreme Court review of No. 7781, Sunray DX Oil Company, et al. v. Federal Power Commission.

These cases all seek review of Federal Power Commission Opinions Nos. 501 and 501-A ordering refunds of amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422. We reversed and remanded all the cases by an opinion filed in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, ...F. 2d.....; and by orders entered in the others cases in accordance with that opinion. This action was taken because we had previously held that the Commission did not have the power to order such refunds.

These cases all concern (1) the power of the Federal Power Commission to order the refunds and (2) the manner of the exercise of that power. The Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue because the same question was decided by our opinion in No. 7781, Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 370 F. 2d 181, which is now pending in the United States Supreme Court on the Commission's petition for certiorari. In the belief that prompt disposition of these cases would be proper and might aid in the resolution of the question by the United States Supreme Court because these cases present no jurisdictional problem although the Sunray DX case now pending on application for certiorari has jurisdictional questions raised by the Commission, we disposed of all of them by an opinion rendered in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, and by appropriate orders entered in the other cases on the authority of that opinion. In so doing we expressly stated that we made no decision on the propriety and validity of the exercise of the power.

The petitions for rehearing assert that the Commission in its application for certiorari in our No. 9289 said that

in the event certiorari was granted it reserves "the right to argue additionally that the Commission reasonably exercised its power in directing the refunds which it ordered in these proceedings." This action is said to be a change of position which deprives the petitioners of their right to be heard in this court on the exercise of the power. The ambivalence of the Commission is something beyond our control. We adhere to our view that we are not concerned with the exercise of a non-existent power. If it should be held on Supreme Court review that we are wrong in our decision as to the existence of the power, we are ready to consider then the manner of the exercise of the power.

The petitions for rehearing and for stay of mandate are severally denied.

SUPREME COURT, U. S.

111, 143, 144

Nos. 1328, 1371, and 1372

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SHELL OIL COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent.*

SKELLY OIL COMPANY, ET AL., *Petitioners,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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June 7, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 1328, 1371, and 1372

SHELL OIL COMPANY, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent*.

SKELLY OIL COMPANY, ET AL., *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents*.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENTS

In two parallel but separate proceedings under Section 7 of the Natural Gas Act, the Federal Power Commission issued seventy-one certificates of public convenience and necessity authorizing sales of natural gas from fields in the Texas Gulf Coast (Texas Railroad

Commission District Nos. 2 and 3). In its decisions, which were issued simultaneously, the Commission (1) held that it was unnecessary for the applicants to present any evidence of need in support of their certificate applications, (2) held, over the dissent of two of its five members, that the in-line price previously determined for sales under contracts dated prior to September 28, 1960 increased by 1¢ per Mcf—to 16¢ per Mcf in District 2 and to 17¢ per Mcf in District 3—for sales to be made under contracts dated after September 28, 1960, and issued certificates conditioned at the 16¢ and 17¢ levels, and (3) deferred action on whether to require refunds of the amounts in excess of the in-line levels theretofore collected by the applicants under *ex parte* temporary certificates issued during the pendency of the hearings on permanent certification. *Hawkins & Hawkins,* Op. 475, 34 FPC 897 (1965); *Sinclair Oil & Gas Co.,* Op. 476, 34 FPC 930 (1965).

On appeal by the consumer interests,[1] the Court of Appeals for the District of Columbia Circuit, in an extensive and carefully reasoned opinion by Chief Judge Bazelon,[2] held that the Commission had erred

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[1] In its petition for certiorari (pp. 3, 5, 7) the FPC refers to respondents as "distributors". Respondent Public Service Commission of the State of New York is not a distributor but is an agency of the State of New York charged with representing the consumer interest. Respondent Long Island Lighting Company, while a distributor, appears in these and similar proceedings as a representative of the consumers to whom it sells gas; this consumer role has been explicitly recognized not only by the courts, e.g., *Long Island Lighting Company* v. *F.P.C.*, 257 F. 2d 717 at 720 (3rd Cir. 1958), but by the signatories to the present FPC petition, see Memorandum for the Federal Power Commission, Nos. 1134 and 1135, this Term, p. 2.

[2] Senior Circuit Judge Wilbur K. Miller dissented without opinion.

both in issuing certificates in the absence of a showing of public need for the gas and in increasing the in-line price as of September 28, 1960. The court deemed it unnecessary to take action on the refund issue inasmuch as the Commission had, subsequent to submission of the case below but consistent with its representations on brief, entered an order requiring refunds in the District 3 proceeding and would, "we may assume," enter a refund order in the District 2 proceeding shortly. *Public Service Commission of the State of New York* v. *F.P.C.*, 373 F. 2d 816 (1967).

Petitions for certiorari have been filed by the Federal Power Commission and by six producers who intervened in support of the Commission in the court below. All three petitions challenge the D.C. Circuit's holding that the Commission erred in increasing the in-line price for contracts dated after September 28, 1960. In addition, Skelly Oil Company, et al., petitioners in No. 1371, challenge the D.C. Circuit's holding on need.

The decision of the court below on the in-line issue is, as the Commission states (FPC Pet. p. 6), "in acknowledged conflict with the rationale of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission,* 370 F. 2d 181". Petitions seeking a writ of certiorari to review the Tenth Circuit's decision have been filed by the instant respondents and other consumer interests, *Brooklyn Union Gas Co., et al.* v. *F.P.C., et al.,* No. 1135, this Term, and the Commission has acquiesced in the granting of that petition. We agree that the conflict between the circuits requires resolution by this Court and that the grant of certiorari here is therefore appropriate.

At the time the petitions were filed, it had been our intention to oppose the request of Skelly Oil Company to review the holding of the court below on the need issue, for the decision below was, in our view, eminently correct, it was not alleged to be in conflict with any decision of this Court or with any decision of a court of appeals for another circuit, and the Commission's deliberate choice *not* to seek certiorari on this issue (see FPC Pet. p. 6 n. 3) at least suggested that the decision below posed no administrative problems requiring the intervention of this Court. Subsequently, however, on May 24, 1967, the Court of Appeals for the Fifth Circuit (Judges Brown, Bell, and Dyer) held, in a related appeal, that the Commission need not make a finding that there is a public need for the gas before it issues a certificate of public convenience and necessity, *Continental Oil Co., et al.* v. *F.P.C.*, Fifth Cir. Nos. 23188 *et al.*, May 24, 1967.[3] We believe that the conflict between the D.C. and Fifth Circuits requires early clarification by this Court, and, accordingly, we acquiesce in the grant of certiorari on this issue also.

Though we are thus in substantive agreement with petitioners' requests for issuance of a writ of certiorari, we take exception to the Commission's procedural request (FPC Pet. p. 7) that action on the petitions in this case be deferred pending action on the petitions (in Nos. 1133-35) seeking review of the Tenth Circuit's *Sunray* decision. Wholly aside from the fact

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[3] Respondents Public Service Commission of New York and Long Island Lighting Company were among the parties petitioner in the *Continental* proceeding, their petitions to review, originally filed in the D.C. Circuit, having been transferred to the Fifth Circuit pursuant to 28 U.S.C. § 2112(a).

that the Commission has neglected to offer any support for its assertion that such procedure is "the Court's normal practice", there is in the present case compelling reason to avoid such a "practice". In the first place, action on the *Sunray* petitions has been deferred, apparently at the Commission's request, so that the instant case is as far advanced as *Sunray;* this is not a situation where an issue presented by a recently filed petition might readily and logically await disposition of that issue in a case which is almost ready for decision. Second, and much more important, simultaneous consideration of *Sunray* and the instant case is essential to an accurate understanding of the factors which actually moved the Commission to elevate its price line for the period after September 1960.

If the Commission really wants a writ of certiorari to issue in this case, if it really wants this Court to review the opinion of Judge Bazelon and the Commission records on which it is based, we have no objection, for we are content to stand on that opinion, confident that it will be affirmed by this Court.

Indeed, assuming certiorari is granted both here and in *Sunray,* it is doubtful that the briefs to be filed in this Court would add anything to the extensive opinions handed down, on the one hand, by the Tenth Circuit in the *Sunray* case and, on the other, by the D.C. Circuit in the instant case and in the earlier *Skelly* case.[4] Accordingly, we respectfully suggest that an appropriate disposition of this case would be grant of

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[4] *Public Service Commission of New York* v. *F.P.C.,* 329 F. 2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.,* 377 U.S. 963.

certiorari and summary affirmance, coupled with grant of certiorari and summary reversal in *Sunray*.

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June 7, 1967

SUPREME COURT, U. S.

FILED

AUG 8 1967

JOHN F. DAVIS, CLERK

No. 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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August 8, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENTS

In March 1964, the Federal Power Commission consolidated for hearing forty applications by producers requesting certificates of public convenience and necessity to undertake the interstate sale of natural gas produced in the upper Texas Gulf Coast (from a producing area known as Texas Railroad Commission

District No. 3). The contracts on which the applications were based had been entered into between September 1958 and October 1963, and the apparent basis for consolidation was that all of the contracts called for initial prices in excess of 16¢ per Mcf—the highest price the Commission had ever found to be in-line.

On the two key issues in the case, the Commission majority, rejecting consumer contentions, held in September 1965 (1) that the certificate applicant was not required to demonstrate that there was a public need for the proposed sale, and (2) that the in-line price in District 3 increased from 16¢ to 17¢ for contracts dated after September 28, 1960, *Hawkins & Hawkins,* Op. 475, 34 FPC 897. On appeal, the U. S. Court of Appeals for the District of Columbia Circuit reversed on both points, *Public Service Commission of New York* v. *F.P.C.*, 373 F. 2d 816 (1967). Petitions for certiorari filed by the FPC and by two groups of producers who had intervened in the court below in support of the FPC are now pending (Nos. 111, 143, and 144, this Term).* We have heretofore filed a memorandum noting our acquiescence in the grant of certiorari, but objecting to the procedure recommended by the FPC.

The instant petition for a writ of certiorari filed by The Superior Oil Company differs in one important respect from the petitions heretofore filed. Like the producer petitioners in Nos. 111 and 143, Superior was an applicant in the proceeding before the FPC (it sought certificates for sales under two contracts, each calling for an initial price of 17.5¢ per Mcf, and dated,

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* The FPC (No. 144) and Shell Oil Company (No. 111) challenge only the D. C. Circuit's reversal of the in-line finding. Skelly Oil Company (No. 143) additionally challenges the D. C. Circuit's reversal of the Commission's holding on need.

respectively, August 1, 1959 and September 20, 1962); it intervened in the court below in opposition to the New York Commission's petition to review the FPC's opinion; and in its present petition it seeks this Court's review of the D. C. Circuit's reversal of the Commission's in-line and need holdings (see Superior Pet. p. 4, Questions 1 and 4). Unlike the other producers, however, Superior not only intervened in the New York Commission's appeal in the court below, but in addition it filed its own appeal, claiming that the Commission erred in failing to find in-line levels even higher than the 16¢-17¢ levels set by the Commission in Opinion No. 475. Superior's contentions were rather summarily rejected by the court below (373 F. 2d at 830; Shell Petition, No. 111, p. 37), and Superior now seeks to have this Court review those contentions (Superior Pet. p. 4, Questions 2 and 3).

While, for the reasons set forth in our Memorandum of June 7, 1967 in Nos. 111, 143, and 144, we acquiesce in the grant of certiorari on Superior's Questions 1 and 4, we strenuously oppose the grant of certiorari on Superior's Questions 2 and 3.

By its Question 2, Superior challenges the FPC's refusal, in determining the in-line price, to consider certain 20¢ sales certificated by the FPC in 1959 under standards which the FPC subsequently conceded were legally impermissible. The Commission has consistently held that such sales provide no valid basis for evaluating the in-line level for the area, see, e.g., *Texaco Seaboard Inc.*, Op. 383, 29 FPC 593 (1963),*

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* Superior asserts (Pet. 6 n. 4), "No court review [of *Texaco Seaboard*] was sought due to settlement between the parties." Superior is mistaken. There was no settlement in *Texaco Seaboard;* indeed, a post-decision offer of settlement by Texaco was expressly rejected by the Commission, 30 FPC 613.

Placid Oil Co., Op. 398, 30 FPC 283 (1963), and the Commission's holdings have been consistently sustained on appeal, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Superior does not allege any conflict among the circuits; nor does it allege that the decision of the court below affirming the Commission on this point is in conflict with any decision of this Court. We submit that the decision below was clearly correct, and that certiorari on this issue is not warranted.

The issue sought to be raised by Superior's Question 3 is even less worthy of review by this Court. Superior challenges the Commission's inclusion, in its comparative price array used to determine the in-line level, of sales made at prices of less than 14¢ per Mcf. But Superior's petition here fails to offer a single word of argument that the Commission's action on this score was erroneous, that the court of appeals' affirmance was in error, or that certiorari is warranted; and it may be noted that Superior did not brief this question at all in the court below and, in consequence, the court made no express ruling thereon. Nor can Superior assert there is a conflict with any other decision—the claim was flatly rejected in the only other case in which it was raised, *Continental Oil Co.* v. *F.P.C.*, 5th Cir. No. 23188 *et al.*, May 24, 1967, slip op. p. 14.

CONCLUSION

Any writ of certiorari granted in No. 231 should be limited to Questions 1 and 4. In the event that certiorari so limited is granted, the Federal Power Commission—which is a respondent only as to Questions 2 and 3, and is actually a co-petitioner as to

Questions 1 and 4—should be deleted as a party respondent.

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August 8, 1967

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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

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THE SUPERIOR OIL COMPANY, PETITIONER

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FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Shell Pet. App. A, pp. 13–43)[1] is reported at 373 F. 2d 816. The opinion and order of the Federal Power Commission (Hawkins J.A. 277–308)[2] is reported at 34 F.P.C. 897,

[1] "Shell Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Shell Oil Company in No. 111, this Term.

[2] "Hawkins J.A." refers to the joint appendix filed in the court of appeals in C.A.D.C. Nos. 19796 and 19957, involving the Commission's order in *H. L. Hawkins & H. L. Hawkins, Jr.* Because the court below consolidated the petitions to review the Commission's order in the *Hawkins* proceeding (involving sales

and its opinion on rehearing (Hawkins J.A. 315–320) at 34 F.P.C. 1330.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1967 (Pet. No. 144, this Term,[3] App., pp. 9–11). On May 8, 1967, the Chief Justice granted petitioner an extension of time to and including June 8, 1967, within which to file a petition for a writ of certiorari. The petition was filed on June 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATEMENT

The court of appeals' decision of which review here is sought sustained in part and set aside in part orders of the Federal Power Commission in two parallel proceedings under Section 7 of the Natural Gas Act. In those proceedings, the Commission issued permanent certificates for a number of sales by independent producers in two pricing districts (No. 2 and No. 3) in the Texas Gulf Coast area.[4] In each proceeding, the principal controversy concerned the maximum price at which the gas in question could initially be sold (the "in-line" price) pending the establishment of

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of gas produced in Texas Railroad Commission District No. 3) with other petitions to review the Commission's order in a similar proceeding (*Sinclair Oil & Gas Co.*, involving sales in the adjacent District No. 2), two joint appendices were filed. The instant petition for a writ of certiorari relates solely to the order in the *Hawkins* proceeding.

[3] See p. 3, *infra*.

[4] The sales had been initiated under temporary authorizations.

just and reasonable rates under Sections 4 and 5 of the Act. The Texas District No. 3 proceedings included petitioner's applications to make two sales, each at an initial price of 17.5 cents per Mcf, the first under a contract of August 1, 1959 (Hawkins J.A. 305) and the second under a contract of September 20, 1962 (Hawkins J.A. 308).

The Commission determined that for sales antedating the Commission's Statement of General Policy No. 61–1, 24 F.P.C. 818, issued September 28, 1960—including petitioner's first sale—the in-line prices were 15 cents in District No. 2 and 16 cents in District No. 3. The court sustained this determination but went on to hold that the Commission had improperly considered contract prices and temporarily certificated sales in fixing the in-line prices for the post-Policy Statement period at 16 cents in District No. 2 and 17 cents in District No. 3. Our petition for certiorari in No. 144, this Term, seeks review of the court of appeals' decision insofar as it set aside the in-line determinations,[5] since in that respect the decision is in conflict with that of the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, pending on petitions for certiorari in Nos. 61 and 62, this Term.[6] Subsequent to the filing of our petition,

[5] The certiorari petitions of Shell Oil Company in No. 111 and Skelly Oil Company in No. 143 raise the same issue. Skelly's petition, in addition, seeks review of the court's conclusion that the Commission had not given adequate consideration to the need for the supplies being certificated.

[6] These petitions, as well as ours in No. 60, also challenge the Tenth Circuit's decision that refunds may not be ordered for sales under temporary authorization in the absence of an express refund condition in the temporary certificate. No. 82, a condi-

the Fifth Circuit, in affirming the Commission in another producer-certificate case, has expressed its agreement with the Tenth Circuit on the in-line question and its disagreement with the court below. *Continental Oil Co., et al.* v. *Federal Power Commission,* C.A. 5, Nos. 23188, etc., May 24, 1967.

In response to arguments of the New York Public Service Commission, the court below also held that in the circumstances of this case the Power Commission had not adequately considered whether there was a public need for the gas involved. At the outset of the administrative proceedings, New York had announced that while in past producer certificate cases to which it had been a party the "need" question had frequently been resolved by means of agreement among all the parties (Hawkins J.A. 7, 16, 19), it would not stipulate to the need for the gas here in question because of an alleged oversupply problem facing some of the pipeline purchasers (Hawkins J.A. 12–13).[7] The Commission—accepting, *arguendo,* New York's claim that some of the pipeline purchasers had paid for gas they had not yet taken—rejected the contention that the existence of such temporary oversupply problems warranted denial of the requested producer certificates, stating (Hawkins J.A. 280):

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tional cross-petition that we have urged should be dismissed as out of time, challenges another aspect of the Tenth Circuit decision.

[7] Counsel for New York explained the need issue as he saw it in the following terms (Hawkins J.A. 12–13):

> * * * I think in the broadest guage need would require a showing that it is needed by the consumer to whom this gas will ultimately flow. That is not what I had in mind.

> * * * We agree with the examiner that, because of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for [the] future, even though the supplies may be slightly in excess of their present-day needs. The issue of public need should be confined to pipeline certificate proceedings, not producer applications.

The court of appeals held that the Commission had erred in ruling that consideration of the public's need for gas should be restricted to pipeline proceedings, and that the Commission's generalized explanation that the "nature of the gas business and the obligation of pipeline companies to the consuming public" sometimes justified a situation of temporary oversupply was insufficient and not adequately considered. The court added, however, that its remand on the public-need issue did not mean it was requiring the Commission to hold long and complex hearings in each producer certificate case, but only that the need issue

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What I had in mind was a more limited showing of need, to wit: That the four purchasing pipelines here involved can take this gas without placing themselves in a take or pay situation, without aggravating an existing take or pay situation and without cutting back on any lower priced gas in order to take it.

In other words, the concept of need that I am insisting on here is not what I would call the very broad need matter, but solely a showing that the pipelines here have a need measured against their take or pay obligations in their existing contracts. * * *

This is a very limited concept of need. That was what I had in mind when I made my suggestion.

should be considered in some proceeding—producer or pipeline—before any permanent certificate was granted a producer (Shell Pet. App. pp. 20–24).

Petitioner was rebuffed by the court of appeals in challenging both of the Commission's District No. 3 determinations as too low. With respect to the pre-Policy Statement in-line price of 16 cents, it argued that the Commission had improperly "discounted" (see Hawkins J.A. 284) the evidentiary significance of some nine so-called *"Trunkline"* sales that had previously been certificated at an initial price of 20 cents per Mcf.[3] In addition, it contended that with respect to both in-line determinations the Commission had failed to explain sufficiently the precise weight that had been accorded the contract and temporary certificate prices considered by the Commission (Shell Pet. App. 37).

ARGUMENT

In No. 144, this Term, we seek review of the decision below insofar as it set aside the Commission's post-Policy Statement in-line determinations on the ground that the Commission, in determining in-line prices, may not consider, in addition to prices contained in permanent certificates authorizing similar sales, prices contained in contracts negotiated between the producers and pipeline purchasers or prices authorized by the

[3] Six of the nine sales were certificated in *Trunkline Gas Co.*, 21 F.P.C. 704, in 1959. The three remaining sales were certificated in *Austral Oil Co., Inc.*, F.P.C. Docket No. G–15819, October 27, 1959. The same *Trunkline* order was cited in support of the present petitioner's objections to the Commission's in-line price determination in *Placid Oil Co.*, 30 F.P.C. 283, affirmed *sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

Commission on a temporary emergency basis. The present petition appears to raise that issue; to the extent it does we do not, of course, urge that certiorari be denied. The petition raises other questions, however, that in our view do not warrant further review.

1. Petitioner's principal quarrel appears to be with the court's affirmance of the pre-Policy Statement price ceiling of 16 cents and its rejection of petitioner's claim that the Commission did not give adequate consideration to the 20-cent *"Trunkline"* sales (Pet. p. 6–8, 10–11). In this respect there is no conflict among circuits. Indeed, the court's approval of the pre-Policy Statement 16-cent ceiling is in accord with the recent decision in *Continental Oil Co., et al.* v. *Federal Power Commission,* C.A. 5, Nos. 23188, etc., decided May 24, 1967, where the Fifth Circuit not only affirmed a Commission order (*Hassie Hunt Trust,* 30 F.P.C. 1438) fixing an identical 16-cent ceiling for another group of pre-Policy Statement sales in District No. 3, but also expressly rejected (slip op. p. 20) the contention of the instant petitioner that the 20-cent *"Trunkline"* sales should not be discounted. Nor is the correctness of this result open to serious question.[9]

Petitioner also suggests that the court below erred in sustaining the Commission's consideration of evi-

[9] The Commission discounted the significance of these sales because they were certificated at a time when the Commission was applying pricing standards that have since been held erroneous by four courts of appeals, and because the certificates for these sales would have been set aside on judicial review in *Trunkline* itself but for a procedural irregularity in a petition for review filed by the New York commission (Hawkins J.A. 284–285).

may be wasted requires that the FPC determine the issue of need *before* the initial sale to a pipeline. Otherwise it may be too late to protect the public interest." Moreover, the court made plain that it was not "demanding that the FPC hold a long and complex hearing in each of its many producer application cases" (Shell Pet. App. 23). On the contrary, the court indicated that in producer cases the Commission could rely on previously decided pipeline certificate cases, staff studies or rule-making determinations. Its remand was not premised on any notion that evidence on the need issue is mandatory in every producer certificate case, but on a judgment that the articulation of the Commission's position on the contentions raised by New York had not been sufficiently related to the specific facts before it. This judgment is of insufficient general importance to require review by this Court.

We recognize, to be sure, that the Fifth Circuit in the *Continental Oil Co.* case, *supra,* stated that it disagreed with the view of the court in the case here. In so stating, it construed the decision here as requiring a burdensome evidentiary hearing on "need" in each producer certificate case. Since, in our view, the decision below does not impose any such onerous requirement, we see no real conflict of substance between the circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, except with respect to the in-line price question also presented in No. 144, this Term.

We renew our suggestion (made in our petition in No. 144) that that petition, the instant petition, and the related petitions, Nos. 111 and 143, be held pending the Court's final disposition of the petitions in Nos. 61 and 62, this Term. The appropriateness of this course is also suggested by the fact that additional petitions involving the same issue may well be filed with respect to the Fifth Circuit's affirmance in *Continental Oil Co., supra,* of the two post-Policy Statement in-line determinations involved in that case.

Respectfully submitted.

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SUPREME COURT, U.S.

Nos. 60, 61, 62, 80, 97, 111, 143, 144, and 231

In the Supreme Court of the United States

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OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, PETITIONER
v.
SUNRAY DX OIL COMPANY, ET AL.

THE UNITED GAS IMPROVEMENT COMPANY, PETITIONER
v.
SUNRAY DX OIL COMPANY, ET AL.

THE BROOKLYN UNION GAS COMPANY, ET AL., PETITIONERS
v.
FEDERAL POWER COMMISSION, ET AL.

FEDERAL POWER COMMISSION, PETITIONER
v.
STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL.

THE UNITED GAS IMPROVEMENT COMPANY, PETITIONER
v.
SUNRAY DX OIL COMPANY

SHELL OIL COMPANY, PETITIONER
v.
PUBLIC SERVICE COMMISSION OF NEW YORK

SKELLY OIL COMPANY, ET AL., PETITIONERS
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

FEDERAL POWER COMMISSION, PETITIONER
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

THE SUPERIOR OIL COMPANY, PETITIONER
v.
FEDERAL POWER COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE FEDERAL POWER COMMISSION

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dence showing sales certificated at prices lower than 14 cents per Mcf, but offers no reasons in support of its apparent view that the Commission should have disregarded the evidence in question. Moreover, petitioner did not raise this objection before the Commission or in the court below; it cannot raise it for the first time in this Court. Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380; *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 498.

2. Since we filed our petition in this matter, limited to the single in-line issue on which there was a conflict, the Fifth Circuit in *Continental Oil Co., supra,* has expressed its disagreement with the court below on the public-need issue. Nevertheless, we remain of the view that this aspect of the decision does not warrant review by this Court, as urged by the instant petitioner.

The Commission has not deemed the public's need for gas an irrelevant consideration in producer certificate cases. It believes, however, that in general the issue whether gas is needed is better resolved in pipeline certificate proceedings than in producer proceedings. The initiation of producer sales is normally preceded by permanent certification of the receiving pipeline facilities, and it is therefore more orderly to consider questions as to whether a particular pipeline has a need for specific supplies (see Shell Pet. App. 21) at the pipeline-certification stage.

As we read the decision below, it does not take issue with this general view. Indeed, it similarly states (Shell Pet. App. 21) that the "possibility that gas

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 60

FEDERAL POWER COMMISSION, PETITIONER

v.

SUNRAY DX OIL COMPANY, ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit in Nos. 60, 61, and 62 (I R. 6696–6757[1]) is reported at 370 F. 2d 181. The opinions and orders of the

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*Together with Nos. 61, 62, 80, 97, 111, 143, 144, and 231.

[1] The printed appendix in these consolidated cases will be prepared in four separately numbered volumes. In order to permit deferred printing of the appendix in accordance with this Court's new rules, the record references to the proceedings before the Commission refer to the pagination of the original Commission records in the separate proceedings in issue here. "I R." and "II R." will be the *Amerada* proceedings; "III R." and "IV R." the *Hawkins* and *Sinclair* proceedings, respectively. The parties have assigned the subsequent court proceedings pagination consecutive with the original Commission records, and that pagination is used herein.

Federal Power Commission in those cases (I R. 5778–5804, 6030–6038) are reported at 31 F.P.C. 623 and 1315.

The Tenth Circuit's *per curiam* order in Nos. 80 and 97 (II R. 6885–6891) and its *per curiam* order denying rehearing (II R. 6921–6925) are reported at 376 F. 2d 578. The opinions and orders of the Commission in those cases (II R. 6222–6230, 6426–6431) are reported at 36 F.P.C. 309 and 962.

The opinion of the Court of Appeals for the District of Columbia Circuit in Nos. 111, 143, 144 and 231 (IV R. 4290–4322) is reported at 373 F. 2d 816. The opinions and orders of the Commission underlying these cases (III R. 7288–7316; 7504–7508 and IV R. 4171–4193; 4281–4287) are reported at 34 F.P.C. 897 and 1330 and 34 F.P.C. 930 and 1357.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in Nos. 60, 61 and 62 (I R. 6758) was entered on December 9, 1966. The petitions for writs of certiorari were filed on March 9, 1967.

The judgments of the Court of Appeals for the Tenth Circuit in Nos. 80 and 97 (II R. 6892–6902) were entered on March 27, 1967. The petitions were filed on April 5 and April 18, 1967, respectively. The Tenth Circuit's order denying rehearing (II R. 6921–6925) was entered on May 18, 1967.

The judgment of the Court of Appeals for the District of Columbia Circuit in Nos. 111, 143, 144 and 231 (IV R. 4323) was entered on February 7, 1967. The petition in No. 111 was filed on April 26,

1967. The petitions in Nos. 143 and 144 were filed on May 8, 1967. An order was issued on May 11, 1967, extending the time for filing the petition in No. 231 until June 8, 1967, when it was filed.

Orders were entered granting certiorari in all nine cases on October 9, 1967 (I R. 6926, 6927, 6928, II R. 6929, 6930, IV R. 4326, 4327, 4328, 4329). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion for the Federal Power Commission, in ascertaining the "in-line" prices at which producers' sales of natural gas should be certificated pending the determination of just and reasonable rates, to consider evidence of prices not yet permanently certificated where (a) the Commission found that a satisfactory appraisal of the contemporaneous conditions of the market required some reference to such data and (b) the Commission substantially discounted the probative value accorded the data.

2. Whether the Commission properly exercised its power to order refunds of the difference between rates in force under a producer's temporary certificate of public convenience and necessity and the in-line price later established, after public hearing on the application for a permanent certificate, where it appeared (a) that the temporary certificate had no express provision warning of the possibility of a refund order, but (b) that the refund order caused no detriment resulting

from justifiable reliance on the absence of such an express provision.

3. Whether it was an abuse of the Commission's discretion to reject a claim of the New York Public Service Commission that there was no need for some of the gas in issue here (a determination based primarily on the F.P.C.'s conclusion that this was a matter more appropriate for consideration in proceedings involving regulation of the pipeline-purchasers).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * * . [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * * .

* * * * *

Section 7(e), 15 U.S.C. 717f(e):

> * * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

In three separate proceedings under Section 7 of the Natural Gas Act—one for each of three pricing districts in the Texas Gulf Coast Area—the Federal Power Commission considered the applications of numerous independent natural gas producers for permanent certificates of public convenience and necessity. The applications related to sales which, for the

most part, had already been initiated under temporary authorizations[2] issued on the basis of claimed emergencies and without notice or hearing.[3] The principal factual controversy in each case concerned the "in-line"[4] price at which the gas could be sold (see *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (*Catco*)) pending the establishment of just and reasonable rates under Sections 4 and 5 of the Act.[4]

After appropriate proceedings, the Commission issued final decisions, granting the permanent certificates on condition that the producers charge no more than specified in-line prices. In determining what prices were in-line, the Commission considered prices at which other permanent certificates had been issued. The Commission, however, also gave consideration to prices of other sales that had not yet been finally certificated.[5] The Commission required the producers

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[2] Most temporary certificates were issued at the price the applicant had proposed. Where the proposed price exceeded 18 cents per Mcf, a provisional guideline price the Commission had previously established as the ceiling above which no sales would be certificated, the Commission required a reduction to 18 cents. Each temporary certificate expressly recited that the price therein was accepted for temporary service only, and that acceptance did not constitute approval of any rate or charge (*e.g.*, I R. 4147).

[3] The criteria and procedures pertinent to temporary authorizations are set forth in Federal Power Commission Regulations under the Natural Gas Act, Section 157.28, 18 C.F.R. 157.28.

[4] Such rates are to be established in the *Area Rate Proceeding (Texas Gulf Coast)*, F.P.C. Docket No. AR 64–2, now under submission to the hearing examiner.

[5] Included among such sales are those that were permanently certificated in the instant proceedings.

in one case, as a further condition of its grant of authority, to refund most of the charges collected under the temporary certificates exceeding the in-line rates fixed in the permanent certificates. In two proceedings, the Commission declined to consider in detail a contention of the New York Public Service Commission that there was no need for the gas in question.

Petitions for review of the District 4—or *Amerada*—decision were consolidated in the Tenth Circuit. That court upheld the pertinent in-line price condition against both producer claims that the price was too low and consumer charges that it was too high. The Tenth Circuit ruled, however, that the Commission had no power to order refunds for past periods because the temporary certificates had not stated expressly that refunds might be required.

Review with respect to Districts 2 and 3—the *Sinclair* and *Hawkins* decisions—was in the District of Columbia Circuit. That court concluded that the Commission had erred in setting the in-line prices by considering prices that had not been permanently certificated. In addition, the District of Columbia Circuit found that the Commission had abused its discretion by not giving greater consideration to the question of need. The refund question was not at issue.

This Court has granted nine petitions for certiorari seeking review of various aspects of the two appellate decisions, and it has consolidated the cases.

In Nos. 60 and 80, the Commission seeks review of the Tenth Circuit's decisions restricting its power to

order refunds. In Nos. 61, 62, and 97, a number of eastern distributors and the Public Service Commission of New York (the "seaboard interests") have petitioned for review of both that refund question and the Tenth Circuit decision that the District 4 in-line price was properly determined.

The Commission also has asked review (No. 144) of the District of Columbia decision that nonpermanent prices should not have been considered in establishing in-line prices for Districts 2 and 3. Various producers sought review of this question (Nos. 111 and 144), and some have also asked (Nos. 143 and 231) this Court to review the decision that the Commission should have considered more fully the need for the gas.[6]

I. THE *AMERADA* PROCEEDING

On September 28, 1960, the Commission issued its Statement of General Policy 61–1, 24 F.P.C. 818,[7]

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[6] A number of related petitions are presently pending. No. 82 is a conditional cross-petition (see *infra*, p. 10, n. 10) from the Tenth Circuit's *Sunray* decision at issue in Nos. 60, 61 and 62. Nos. 227, 415 and 516 seek review of the Tenth Circuit's "no refund" ruling in *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F. 2d 161. Nos. 504, 520, 526 and 628 involve similar price, refund, and need issues, as to all of which the Fifth Circuit affirmed the Commission in *Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510.

[7] The Statement of Policy was promulgated concurrently with the issuance of the Commission's decision in *Phillips Petroleum Co.*, 24 F.P.C. 537, affirmed *sub nom. Wisconsin* v. *Federal Power Commission*, 303 F. 2d 380 (C.A.D.C.), affirmed, 373 U.S. 294. One point decided in *Phillips* was that regulation of independent producers would be facilitated by the establishment of area rates. To implement the area rate approach, the Policy Statement designated twenty-three pricing areas, includ-

establishing an 18 cent per Mcf ceiling upon the initial price at which future sales in District 4 would be certificated. *Skelly Oil Co.*, 28 F.P.C. 401,[3] issued on August 30, 1962, determined an in-line price of 15 cents per Mcf for District 4 sales contracted prior to September 28, 1960. Concurrently with the *Skelly* opinion, the Commission also amended Statement of General Policy 61–1 to reduce the District 4 ceiling price from 18 cents to 16 cents per Mcf. The Commission set the *Amerada* proceeding to determine what the in-line price should be for thirty-five sales of gas contracted during the period between September 28, 1960, and August 30, 1962.

The Commission, on March 23, 1964, entered the first of the orders here under review (Opinion 422; I R. 5769–5804). It found that the in-line price for the period was 16 cents per Mcf. It rejected both the seaboard interests' contention that the Commission must set the in-line price at the 15 cent per Mcf level applied to sales occurring before September 28, 1960, and the producers' claim that the Commission must accept any producer-established price within the 18 cent ceiling

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ing the three Texas Railroad Commission Districts involved here. With exceptions not important here, the Statement announced two ceiling prices for each area—one relating to certification of new sales and the other defining the level at which the Commission would suspend, under Section 4(e) of the Act, producer-initiated increases of prices for existing sales.

[3] *Skelly* was affirmed in part and remanded in part *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), certiorari denied *sub nom. Prado Oil & Gas Co. and Skelly Oil Co.* v. *Federal Power Commission*, 377 U.S. 963.

set by the Policy Statement of that date. It ruled that the in-line price should reflect "current conditions in the industry" as measured by the price level at which substantial volumes of gas were moving in interstate commerce (I R. 5783–5784).[9]

The principal evidence was an exhibit sponsored by the FPC staff (I R. 1600–1625) showing the prices for comparable District 4 sales contracted between January 1, 1955, and August 31, 1962, at a price of 14 cents or greater.[10] In arriving at the 16-cent line, the Commission compared the prices in contracts entered into during the two-year tenure of the 18-cent ceiling with prices in comparable contracts entered into during the two-year period preceding promulgation of that guideline. The Commission thought it necessary to include in this analysis nonpermanent prices, such as those governing sales under temporary certificates, because only a small percentage of the gas contracted for after the

[9] The test was first announced in *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 823 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co. and California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881.

[10] The examiner excluded evidence of producer costs and economic trends (I R. 5085–5107). The Commission affirmed and the District of Columbia Circuit dismissed a petition for review as premature. *Texaco Inc.* v. *Federal Power Commission*, 329 F. 2d 223, certiorari denied, 375 U.S. 941. The Tenth Circuit approved the ruling (I R. 6707–6710). Texaco's conditional cross-petition in No. 82, this Term, seeks review of the exclusion of the cost evidence if this Court holds improper the Commission's consideration of nonpermanent prices. As this Court decided in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227, n. 3, exclusion of such evidence is appropriate.

Policy Statement was moving at permanently certificated prices (I R. 5787):[11]

> We are, of course, aware that "the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged." We, therefore, cannot and do not find that the 17.2-cent contract price average is the "in-line" price. However, a blind application of the doctrine that if a certificate application is challenged no weight can be given to the contract price in determining the price line would leave the Commission without substantial evidence on which to base its decision. We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the "in-line" price for this period. * * *

The evidence showed that the weighted average price of pre-Policy Statement contracts had been 16.5 cents per Mcf, whereas the comparable average price for the later period was 17.176 cents per Mcf (I R. 5786). The Commission concluded that these figures indicated an upward shift in the line. But, because the contract prices were subject to downward revision by Commission action on requests for certification, either temporary or permanent, the Commission relied

[11] The permanently certificated sales shown in the staff exhibit accounted for 355,000 Mcf (I R. 5781) as opposed to total sales of over 3,200,000 Mcf (I R. 5785).

on them mainly to establish that the price level had risen.

Observing that 82 percent of the gas sold pursuant to contracts executed during the post-Policy Statement period was at least 16 cents per Mcf (I R. 5786), the Commission explained (I R. 5789):

> In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications. * * * The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf. While there is evidence that points in the direction of a higher price we believe the teachings of CATCO require that we draw the line at the lowest reasonable level. It is, therefore, our considered opinion, and we so find, that the price required by the public convenience and necessity for these sales is 16 cents per Mcf * * *.

In light of the then-recent decision in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), that equitable considerations might warrant a refund even though the temporary certificate had not contained an express refund condition, the Commission deferred, for further briefing, the allowance of refunds [12] of amounts

[12] The refund question was first raised at the commencement of the hearing before the examiner when, in response to the queries of the seaboard interests and other intervenors (I. R. 65–81), the producers asserted that refunds could not be

collected pursuant to temporary certificates that had authorized prices above 16 cents per Mcf but had not referred to refunds.[13] Then, in a second decision (Opinion 501; II R. 6222–6230), it ruled that a balancing of equitable considerations required refunds of such amounts, less relatively minor amounts of royalties and unrecoverable State production taxes.

The Tenth Circuit, on review of the first order, affirmed the in-line price determination. After reviewing the Commission's analysis, the court stated (I R. 6727–6728):

> [I]n the case at bar the Commission was confronted with a difficult situation. CATCO tells it to hold the line. The Ninth Circuit UGI decision says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity

ordered with respect to temporary certificates not having express refund provisions (I R. 87–90). The Commission denied (I R. 5305–5311) an intervenors' motion (I R. 5060–5068) that the temporary authorizations be vacated or amended so as to impose an express refund condition.

[13] In the relatively few instances in which amounts in excess of the in-line price had been collected pursuant to temporaries that contained "express" refund conditions, the Commission required that refunds be made without delay (I R. 5795).

> is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation. * * *" [Footnotes omitted.]

On review of the Commission's second, or refund, decision the court set aside the agency order (II R. 6885–6891) on the theory that the Commission could not order refunds in the absence of an express refund condition in the temporary certificate.[14] Thus, it did not reach the producers' contentions that the Commission's balancing of the equities was improper.

II. THE *SINCLAIR* AND *HAWKINS* PROCEEDINGS

Sinclair and *Hawkins* were separate proceedings involving sales in Texas Railroad Commission Districts Nos. 2 and 3, respectively. Each proceeding involved both pre- and post-Policy Statement sales. The producers were seeking approval of their contract prices with the pipeline purchasers—which were as high as 20 cents per Mcf. The seaboard interests urged

[14] The court, in its first opinion, reviewed and disapproved the Commission's refund order, concluding there had been error in deferring the refund question, because of a lack of power to decide it. The petitions in Nos. 60, 61, and 62 sought review of this aspect of the first Tenth Circuit decision. Those in Nos. 80 and 97 related to the second decision, which upset the refund order the Commission ultimately entered. Since the petitions have all been granted, there is no remaining question in this Court as to the propriety of the Tenth Circuit's review in its first decision of the Commission's power to direct refunds. (See the petition in No. 60, at pp. 7–8, n. 6.)

that no sales should be certificated at a price in excess of 15 cents per Mcf in either district.

The Commission adopted neither approach. It began by dividing all of the sales in question into two groups: those based upon contracts executed prior to September 28, 1960, the date of Statement of General Policy No. 61–1, *supra,* and those based upon contracts executed after that date. The Commission determined that for sales antedating the Policy Statement the in-line prices were 15 cents in District 2 and 16 cents in District 3. For subsequent sales, however, it fixed a 16 cent in-line price in District 2 and 17 cent in-line price in District 3.

In *Sinclair,* about 60 percent of the gas flowing under comparable contemporaneous contracts had not been permanently certificated. The Commission therefore made some use of evidence of nonpermanent prices. Chairman Swidler explained (IV R. 4180):

> The permanently certificated prices reflect only a part of the market activity in the post-policy period. Permanent certification is granted only where the proposed price is within the applicable guideline price, and where there is no contest by any interveners. Thus to limit the consideration to permanent certificates would permit a price freeze and would render the hearing in this proceeding meaningless. The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested.
>
> At the time of the hearing the producers and the pipeline purchasers had experienced more than three years of doing business under the

> provisions of Statement of General Policy No. 61–1, and their transactions under temporarily certificated prices constituted a heavy and significant percentage of all jurisdictional sales in District No. 2. To the extent that "the price line is intended to reflect *current* conditions in the industry," *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 824 (CA 9), the determination of an in-line price calls for a scrutiny of all pertinent sales activity, whether under permanent or under temporary certification. See *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438, 1442–1443 (1963). We therefore approve the Examiner's action in giving consideration to the temporarily certificated sales.

He further pointed out (*ibid.*) that, although non-permanent contract prices "should not be given primary consideration," such prices "do show economic trends in the area and are entitled to some weight."

In seeking, on these premises, to determine "current conditions" in District 2 (IV R. 4180), the Commission noted that the majority of the post-Policy Statement gas was being sold at prices in excess of 16 cents per Mcf (IV R. 4181) and over 40 percent was at 18 cents per Mcf (IV R. 4178). Because of the large volume at these higher prices, the Commission concluded there had been at least a one cent upward shift in prices, and set the in-line price at 16 cents per Mcf for post-Policy Statement sales.

In *Hawkins,* the Commission fixed the 16 cent pre-Policy Statement price on the basis of a record that showed a concentration of over fifty percent of the permanently certificated volumes between 16 and 16.2

cents per Mcf (III R. 7294). It noted that it had found the same price line on the basis of similar records in *Texaco Seaboard Inc.*, 29 FPC 593, and *Hassie Hunt Trust, et al.*, 30 F.P.C. 1438, affirmed *sub nom. Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510 (C.A. 5).[15]

Because permanently certificated sales accounted for 70 percent of the total relevant post-Policy Statement volumes in the *Hawkins* District (III R. 1438–1442; cf. III R. 1417–1418, 1447; see III R. 7294), the Commission was able to place greater reliance upon trends discernible from an examination of such sales. It noted that the weighted average price for such sales was 16.17 cents per Mcf (III R. 7295), almost exactly one cent higher than the comparable figure—15.16 cents—for permanently certificated sales in the pre-Policy Statement period (*ibid.*). Three sales at 18 cents per Mcf reflected about 40 percent of the total volumes under permanent certificate (III R. 7295). Relying essentially on these factors, but giving "some weight" as well to nonpermanent prices, the Commission concluded that the District 3 price line had risen a cent to 17 cents per Mcf.[16]

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[15] The review proceedings in *Continental* involved two separate Commission orders. The pending petitions for certiorari (Nos. 504, 520, 526 and 628, this Term), which seek review of the *Continental* decision, see p. 8, n. 6, *supra*, do not question the validity of the order in *Hassie Hunt Trust*.

[16] As in *Amerada*, the Commission postponed determination of the refund problem (III R. 7304). Refunds were later ordered in *H. L. Hawkins & H. L. Hawkins, Jr.* (*operator*), 36 F.P.C. 149. Review of the order is pending *sub nom. Skelly Oil Co., et al.* v. *Federal Power Commission* (C.A. 10), Nos. 9220, *et al.*, and is being held in abeyance to await this Court's

The Court of Appeals for the District of Columbia Circuit sustained the Commission's determination of the 16 cent in-line price in District 3 for sales antedating the Policy Statement. (The District 2 determination for that period was unchallenged.) However, it agreed with the seaboard interests that the Commission should have confined its inquiry into appropriate in-line prices for the later period to an examination of prices at which sales had been permanently certificated, and accordingly remanded the proceedings to the Commission for a redetermination of in-line prices. Noting that the Court of Appeals for the Tenth Circuit had recently approved the Commission's similar approach in *Amerada* the court distinguished that case on the ground that there no appreciable volume of gas had been permanently certificated, and stated, "* * * we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case" (IV R. 4312). The court recognized "that our decision may cause the in-line price to be frozen temporarily during the interim period [prior to a] * * * rate determination under § 4 or § 5 of the Act," but said "[t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing." (IV R. 4314.)

On the "need" issue, the court held (IV R. 4293–4301) that the Commission had not adequately explained its rejection of the contentions of the New York Commission that there was no public need for

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decision of the present case. In *Sinclair* the refund question is pending before the Commission (IV R. 4191).

the gas involved in the *Sinclair* and *Hawkins* proceedings.

SUMMARY OF ARGUMENT

I

Price is an element of the public convenience and necessity. Moreover, the price allowed as a result of a Section 7 (certification) proceeding is apt to govern until such time as there may be a full-scale rate inquiry under Section 4 or 5 of the Act (a period which may well extend for several years). The Commission's essential duty in passing upon the applicant's initial price is to evaluate market conditions and, in this light, to assay a reasonable approximation of the fair price for the gas—a figure that will presumably elicit continuing supplies for the interstate market, yet protect against the danger of excessive and inflationary price proposals by dominant suppliers.

All of the instant certification proceedings involve the Commission's efforts to determine, in designated producing areas, whether proposed prices would be "in line". The problem was complicated, in the Commission's view, by the fact that very significant amounts of gas were being sold in these areas under temporary authorizations—that is to say, under arrangements which had not received the screening which is provided in Section 7 proceedings that look to permanent certification. Yet, the Commission was persuaded that, in the circumstances of each case, some sales at nonpermanent prices were probative to some degree of contemporaneous conditions, and that a satisfactory appraisal of the price line could not be

made on a record that wholly excluded such data from the process of determining whether a proposed price is in or out of line.

Because of the differing circumstances reflected in each record, the Commission's manner of considering the nonpermanent data, and the weight given them, varied from case to case. In each proceeding, however, there is substantial support for both the Commission's decision to make use of these data, and the limited probative value attached to the data. We contend, therefore, that the Commission did not abuse its discretion in making a carefully circumscribed use of the challenged evidence.

II

The Commission has authority to order refunds of amounts collected at temporarily authorized prices that prove to exceed the in-line price established in a permanent certificate of public convenience and necessity. There is no sound basis for the Tenth Circuit's holding that the absence in a temporary certificate of an express allusion to the possibility of refunds necessarily makes inequitable a Commission order directing refunds of such excess amounts. Here, the producers were given the opportunity to show that they justifiably relied to their detriment on the absence of such an express provision. They were able to show only a limited detriment, in the payment of royalties and State production taxes, and those expenditures were excluded from the ambit of the Commission refund order. On such a record there is no element of inequity in ordering

a refund; and the absence of refunds would mean that the consuming public is the loser to the extent that it paid out-of-line prices while gas was flowing under temporary certificates issued in response to *ex parte* producer contentions that they would otherwise suffer uncompensated losses of their gas reserves.

III

The New York Public Service Commission did not show that there was no need for some of the gas in issue here, but claimed that the burden of demonstrating pipeline need was on the producers. The Commission, however, regularly considers the supplies and needs of pipelines in proceedings and other activities that focus on a particular pipeline and *all* of its suppliers and customers. In these circumstances, it was not an abuse of discretion for the Commission to decline to give more detailed consideration to the New York arguments in the context of producer certification proceedings.

ARGUMENT

I. THE RELEVANT DETERMINATIONS OF IN-LINE PRICE ARE BASED UPON EVIDENCE OF CURRENT CONDITIONS APPROPRIATE TO THE PURPOSE AT HAND

A prime function of certification proceedings under Section 7 is to implement "the purpose of the Natural Gas Act * * * to underwrite just and reasonable rates to the consumers of natural gas." *Catco, supra,* 360 U.S. at 388. But, as this Court there recognized it is not practical for the Commission, in a Section 7 proceeding, to make the detailed studies of costs and other considerations that enter into determination of the just

and reasonable price. *Id.* at 391. Consequently, *Catco* directs the Commission to condition issuance of permanent certificates upon producer acceptance of in-line prices "so * * * that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." *Id.* at 392.

The essence of the problem is how to determine the price line (which will govern for an interim period) in a manner that is reasonable and fair, while avoiding the protracted proceedings that inevitably accompany the determination of just and reasonable rates. The Commission has evolved an approach to this problem that finds its origins in the Ninth Circuit decision in *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.,* and *California Co.* v. *United Gas Improvement Co.,* 365 U.S. 879 and 881, and several other courts of appeals' decisions.[17] In *Callery* this Court described the procedure as follows (382 U.S. at 227):

> Consumer protection is afforded by keeping the "in-line" price at the level where substantial

[17] *Public Service Commission of New York* v. *Federal Power Commission,* 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York* and *Shell Oil Co.* v. *Public Service Commission of New York,* 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission,* 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.,* 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 147 (C.A. 5),

> amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way "suspect." * * *

The refinements of the problem presented here are rooted in circumstances which were not before this Court in *Callery* or the Ninth Circuit in *UGI:* in *Amerada* the record showed that approximately 90% of the gas was entering the market under temporarily certificated prices; in *Sinclair* and *Hawkins,* although more gas was being sold under permanent, unreviewable certificates (40% and 70%, respectively), it was the Commission's judgment that a considered appraisal of current market conditions again required some reference to sales being made under temporary authority.

The Tenth Circuit, in its decision now before this Court, and the Fifth Circuit in *Continental Oil Co.* v. *Federal Power Commission,* 378 F. 2d 510, agreed with the Commission that it could, in such circumstances, give some consideration to prices not yet permanently certificated. The District of Columbia Circuit, on the other hand, has held that the Commission may not refer to such prices.

We suggest that the District of Columbia Circuit's decision would have two related consequences inconsistent with the objectives of an in-line price determination: its rule would generally fix the price line at the level found in the first certification proceeding in

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certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co,* 366 U.S. 965; *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652 (C.A. 10); *California* v. *Federal Power Commission,* 353 F. 2d 16 (C.A. 9).

a particular area; and the Commission would lose the ability to give even limited consideration to the changing conditions under which the producers offer gas to the pipelines.

A. THE COMMISSION SHOULD HAVE DISCRETIONARY AUTHORITY TO CONSIDER NONPERMANENT PRICES AS EVIDENCE OF CONTEMPORANEOUS CONDITIONS, IF THE EVIDENCE IS RECOGNIZED AS HAVING APPROPRIATELY DIMINISHED PROBATIVE FORCE

In cases presenting questions of the proper price line, the Commission has, since 1960, taken as its touchstone the Ninth Circuit's extensive discussion of the problem in *United Gas Improvement Co.* v. *Federal Power Commission, supra* (*"UGI"*). The Ninth Circuit holding was (283 F. 2d at 824):

> [T]he price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. * * *

The Ninth Circuit also held that some "suspect" prices—*i.e.*, those still subject to Commission or court review—should not form the basis for setting the "in-line" prices.

In cases such as *Amerada* and *Sinclair*, the Commission can either refer to "contemporaneous" prices "where substantial amounts of gas have been certificated to enter the market," or it can restrict its examination to prices "no longer subject to judicial review or in any way 'suspect.'" See *Callery*, 382 U.S. at 227. But it cannot follow the suggestion inherent in *Callery* and *UGI* that it do both.

The Commission has therefore taken what, in its judgment, is a middle course—considering, to some extent, nonpermanent prices as giving some indication of the current conditions; but, at the same time, taking account of the reasons underlying the "suspect price" doctrine by substantially discounting the probative value of prices that have not been permanently approved.

In doing so, the Commission has attempted to apply the essential rationale of the Ninth Circuit's decision. *UGI* involved challenges to Commission reliance on two types of price data: (1) "certificated prices [that] for the most part [had] never been subjected to Commission scrutiny" (283 F. 2d at 823); (2) prices subject to litigation pending before the Commission or courts. The Ninth Circuit found an abuse of discretion in reliance on the latter evidence. *Id.* at 824. It held, however, that the former type of prices could be considered, so long as they were not similar to those under court review.

In approving consideration of "prices not previously scrutinized," the Ninth Circuit gave paramount consideration to the need to base price line determinations on current conditions. The court noted that a failure to consider the prices not theretofore scrutinized "could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today." *Id.* at 824. To exclude the evidence would, in the court's view have created the risk of an in-line price at which the pipeline would have been unable to compete for reserves at fair, prevailing prices.

The Commission's view in the cases at bar was that a total exclusion of nonpermanent prices would have made unattainable the objective set forth in *UGI*: making certain that determinations of the line are a fair reflection of the price a pipeline must pay at a given point in time to persuade a producer to make gas available to the public. The contrary approach—ignoring all nonpermanent prices—would make no allowance at all for changing economic conditions in the market, and would necessarily freeze the price level at the first in-line determination for a given area, unless the Commission received the cost evidence that *Callery* recognizes would unduly prolong the proceedings.

The District of Columbia Circuit recognized as much, but found that this was the proper result. The opinion asserts that rejection of evidence of current conditions is required by *Catco* and *Callery*. The conclusion, said to follow from this Court's holding that cost and other evidence of the just and reasonable price may be excluded from Section 7 proceedings, was: "[i]f the courts and the FPC will not allow consideration of evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions." (IV R. 4313). This, however, misconceives the reason for excluding cost evidence from Section 7 proceedings. The exclusion is not based on a judicial direction that current conditions are to be ignored. On the contrary, *Callery* expressly recognizes that the in-line determination is to be based on a study of *"contemporaneous* certificates" (382 U.S.

227; emphasis supplied). The justification for proceeding without a presentation of cost evidence is simply the need to expedite the determination of the price line. The problem is not how to exclude reference to current conditions, but how to give those conditions proper weight without the burdens and delays characteristic of a full-scale rate proceeding.

The District of Columbia Circuit also asserted that, except for a producer's ability to file an increased rate under Section 4 of the Act (which, in turn, could be suspended and subjected to a full-scale rate inquiry), "This kind of freeze seems to be required by the logic of *CATCO* and in-line pricing" (IV R. 4314). But it is not an answer that Section 4 leaves room to file for increased rates. An artificially low in-line price not only would be unfair to producers, but it would also fail to implement the interests of the ultimate consumers. One of the primary purposes of in-line pricing is to discourage increased-rate filings, which could well have the untoward effect of eliminating price stability from the market.[16] Such filings, moreover, are subject only to a relatively brief suspension. At best the consuming public would be relegated to retrieving the excess charges through refunds many years later—a remedy that this Court has recognized as less than wholly satisfactory. *United Gas Improvement Co.* v.

[16] As we noted in our brief in *Callery* (Br. in Nos. 21 *et al.*, October Term, 1965, pp. 17–19, and n. 11), experience has shown that the vast majority of producers whose initial rates have been reduced to the in-line price level have voluntarily chosen to continue operating at that level despite contractural and certificate authority to file higher rates.

Callery Properties, Inc., 382 U.S. 223, 230; *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524, and *Federal Power Commission* v. *Tennessee Gas Co.*, 371 U.S. 145, 154–155.[19]

We submit that the better rule is to allow the Commission some flexibility in the matter—some room within which to exercise its expert judgment[20] in evaluating the best available evidence of current conditions. Of course the Commission must exercise due care in deciding when to utilize nonpermanent prices, and the weight to be given them. Such an approach

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[19] The Commission's experience, moreover, was that pipeline rate increases, which faced the Commission at the start of the 1960's, were in large part triggered by producer rate filings. The pipeline increases normally exceeded the increase in purchased gas costs.

[20] We note that the District of Columbia Circuit is apparently willing to give the Commission such discretion at least with respect to some prices that are in some way suspect. The seaboard interests contended below that the Commission should not have considered certain permanently certificated prices, which were claimed to be "tainted," by reason of their having been based on other prices that were allegedly "incorrectly certificated in light of *Catco* and the subsequent court cases.'" Although the court of appeals though re-examination of such prices "sometimes * * * may be wise" it nonetheless concluded that FPC may give weight to permanently certificated prices "that were certificated under standards later changed by the courts" (IV R. 4315).

We by no means disagree with this conclusion; we contend that it is correct. But we submit that it is anomalous to say that prices decided under incorrect standards may be considered, although prices not yet adjudicated must be excluded. Each for different reasons is "suspect." Each, in proper circumstances, and appropriately discounted, has been considered by the Commission. Because, as we shall show, that discount properly avoided the dangers attendant upon the use of "suspect" prices, that action should be upheld as a proper exercise of administrative authority.

would be fair to consumers and producers alike. At the same time the impetus to price instability would be largely removed; there is little incentive to propose increases which would be seriously out-of-line when that carries with it the prospect of refunds with interest at a point further down the road.[21]

B. THE RECORD IN EACH PROCEEDING SHOWS THAT THE COMMISSION WAS WARRANTED IN ITS LIMITED USE OF NONPERMANENT PRICES

In each of the three proceedings at issue here, the Commission determined in-line prices for the period after September 28, 1960. In making its decisions, the Commission took as its starting point the in-line prices it had set for the immediately preceding period—prices which are not now challenged as being too high.[22] In each instance, the Commission imposed upon the producers the burden of showing a justification for any increase. Ultimately, on the basis of the evidence presented, it found that in-line price to be 1 cent higher than for the preceding period. In each case, the Com-

[21] The assumption that freezing the in-line price works no injury because producers can thereafter file for an increase has a further defect which should be noted. When the Commission grants a permanent certificate at the in-line price, its practice—approved by this Court in *Callery*—is to order an immediate refund of amounts in excess of that figure which were collected during the preceding period when the producer was operating under temporary authority. If the line from which that refund obligation is measured is artificially low, the producer is, to that extent, damaged; and the damage is not remediable by prospective rate increases.

[22] The price set for the earlier period in *Sinclair* was not challenged below. The challenge to the earlier price set in *Hawkins* was rejected by the District of Columbia Circuit and has not been renewed here, except by Superior in No. 231, this Term.

mission found it necessary to reject the seaboard interests' claim that nonpermanent prices should be totally excluded from consideration. But in each case, the probative weight of these prices was substantially discounted in the manner required by the record.

1. *Amerada.* In determining the appropriate in-line price in District 4 for the period following September 28, 1960, the Commission was faced with virtually a total lack of evidence of current conditions that was not in some way "suspect." Only a small percentage of the gas contracted for in the district during the later period had been permanently certificated, *supra,* p. 11, n. 11. Unless some reference was made to nonpermanent prices, the Commission would have had no way of knowing whether the price line it found reflected the contemporaneous market. It would have in effect been relegated to conceding that no price was significant other than those the intervenors in this very case had been willing to agree to. (All other sales had been set for hearing because of intervenor protests.)

In examining the price evidence, the Commission found that the weighted average contract price of gas contracted for during the two years of the earlier period had been 16.5 cents. But for the later period, the comparable weighted contract average was 17.176 cents, or .676 cents higher (I. R. 5786).

Since the comparison was not limited to permanently certificated prices, the Commission did not rely on these averages for the establishment of any absolute in-line price level. It drew from the analysis simply the conclusion that satisfaction of the growing

interstate market in the later period had required a somewhat higher price than in the earlier years. It took as the base point the 15 cent price at which certificates had been issued for the earlier period in *Skelly Oil Co., supra.* Then, because the comparison of contract prices showed an increase of about one cent, the Commission established a 16-cent per Mcf in-line price for the later period, noting that this was the lowest price at which substantial volumes of gas had been sold (I R. 5789).

The reason for the Commission's use of nonpermanent prices in *Amerada* is plain—these prices were for all practical purposes the only available evidence of current conditions. As the Tenth Circuit said (I R. 6721), "when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries." If the Commission is ever to be allowed to refer to nonpermanent prices, it must be in a case such as *Amerada.* Presumably, the District of Columbia Circuit would not disagree. For it did not totally reject the Tenth Circuit's decision. It said, simply, "we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to" *Sinclair* and *Hawkins* (IV R. 4312).

Assuming that it was appropriate for the Commission to give some recognition to nonpermanent prices in the context of the *Amerada* proceeding, there should be little question that the probative weight accorded such prices properly took into account the problems that inhere in the use of such data. The absolute price

level was not determined solely on the basis of the nonpermanent prices. Such prices were used mainly as a measure of the relationship of price levels during two periods of time. Once that relationship was determined, it was applied to the actual in-line prices permanently certificated for the earlier period and affirmed by the courts. By taking the relationship discerned from the nonpermanent prices, and tying it to the previously established price level accepted by the Commission and the courts, the agency in a reasonable way implemented the policy considerations that have led the courts to articulate the "suspect price" doctrine. The result, we submit, should be accepted as one that has rational basis, is reasonably adapted to the characteristics of the Section 7 proceedings, and reflects a responsible exercise of the broad powers committed to the expert judgment of the agency.

2. *Sinclair.* In dealing with the question of the proper in-line price for District 2, the Commission was again able to accept as established a 15 cent per Mcf price for the period preceding September 28, 1960. That price had been established in *Hassie Hunt Trust et al.*, 30 F.P.C. 1438, and ultimately was affirmed in the *Continental* case, *supra* (378 F. 2d 510 (C.A. 5)).

The evidence with respect to the later period had a somewhat different cast than in *Amerada*, and the Commission accordingly took a somewhat different approach. A not insubstantial volume of gas was flowing at permanently certificated prices. On the other hand, an even greater volume of gas, approxi-

mately 60 percent of the total, was flowing under temporary certificates (IV R. 4176–4178, 4181).

In reviewing a statistical analysis of the permanent and nonpermanent prices, the Commission recognized that more than 40 percent of the total volume was moving at 18 cents, although under temporary authorization. While this latter price could not have been, and was not, taken at face value, the Commission concluded, in fixing a 16 cent level, that these sales could not be ignored if current conditions were to be properly evaluated.

To be sure, the proportion of permanently certificated sales was higher than in *Amerada*. But there was at the same time substantial reason for concluding that a realistic view of the current conditions of the market required some examination of nonpermanent prices; the alternative was to ignore over half the volume of gas flowing in the market. Moreover, the Commission had reason to believe that the nonpermanent prices did in fact reflect to a degree market conditions, and were not, as the seaboard interests contended, a mere mechanical reflection of the 18 cent "guideline" ceiling previously established in the Policy Statement. Indeed, better than 25 percent of the nonpermanent volume was at prices under 18 cents (see IV R. 4178, 4181 at n. 4).

No doubt, on this evidence, a court, examining the matter *de novo,* might choose a different price line. There is room for arguing that the price line should be 15 cents, or 15.5 cents, or even as high as 18 cents. But, in the final analysis, the statute commits the decision to the expert judgment of the Com-

mission. There is adequate evidence in the record to support the 16 cent price line and the courts should therefore accept it.

3. *Hawkins.* As in the case of *Sinclair,* prior litigation had established an in-line price for sales occurring before September 28, 1960, in the District 3 area in issue in *Hawkins.* A 16 cent price was established in *Texaco Seaboard Inc.,* 29 F.P.C. 593, and *Hassie Hunt Trust et al.,* 30 F.P.C. 1438, 1441. The Commission reviewed additional evidence available to it in *Hawkins,* re-affirmed the 16 cent in-line price, and that ruling is not challenged here, except as being too low, see p. 29, n. 22, *supra.*

The evidence relating to the years after September 28, 1960, presented a third variation on the problem presented in *Amerada* and *Sinclair.* This time, the Commission was able to work with a record showing that a majority of the gas flowing under contemporaneous contracts was permanently certificated. Yet, there still was some gas—a little under 30 percent of the relevant volume—subject to temporary certificates (see III R. 1438–1440, 1447, 7295). Accordingly the Commission placed principal weight on the permanently certificated prices; referring only to such prices, the Commission found that the weighted average had risen by about one cent. In addition, over 40 percent of the permanently certificated volume for the later period was flowing at 18 cents per Mcf. On the record, the Commission concluded that a 1 cent increase in the price line was justified, from 16 to 17 cents.

The additional consideration—"some weight"—given to nonpermanent prices served to confirm the 17 cent price. Certainly this sort of limited weight given to the nonpermanent prices is not a justification for holding the 17 cent line unwarranted.

The three proceedings here are part of the Commission's ongoing attempt to follow this Court's command to aim "at keeping the general price level relatively constant pending determination of the just and reasonable rate." 382 U.S. at 228. In these and various other proceedings it has undertaken to do just that. In many of the cases it has, as here, examined evidence of nonpermanent prices.[23] The Commission's performance does not support any contention that it has disregarded this Court's instruction to keep prices stable. On the contrary the Commission's efforts have met with success. *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 312–313. As the Ninth Circuit recently observed in approving a Commission in-line price determination (*California* v. *Federal Power Commission,* 353 F. 2d 16, 22):

> Considerable water has gone over the dam since that time [*i.e.,* the decisions in *Catco* and

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[23] *E.g., Ohio Oil Co.*, 27 F.P.C. 551, 553, affirmed *sub nom. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.); *Skelly Oil Co.*, 28 F.P.C. 401, 408, affirmed in relevant part *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, 245–246 (C.A.D.C.), certiorari denied *sub nom. Prado Oil & Gas Co.* and *Skelly Oil Co.* v. *Federal Power Commission*, 377 U.S. 963; *Texaco Seaboard Inc.*, 29 F.P.C. 593, 597, 598; *Hassie Hunt Trust, et al.*, 30 F.P.C. 1438, 1444, affirmed *sub nom. Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510 (C.A. 5).

> *UGI*], and the Commission is now, as evidenced by the opinions of the Commission in this case, fully aware of the duty that Catco imposes on it to protect the consumer. Its actions in other matters evidence the same awareness. (General Policy Statement No. 61–1, Sec. 2.56, 18 C.F.R. 2.56, amended 26 F.P.C. 661 (1961), 28 F.P.C. 441 (1962), 29 F.P.C. 590 (1963), 30 F.P.C. 1435 (1963); FPC Annual Report, 1964, p. 106). As the Commission states in its brief, after several years of its intensive efforts the national average price for gas levelled off, see FPC Ann. Rep., 1964, at 106, and even appears to have declined, see U.S. Dep't of Labor Wholesale Prices and Price Indexes. B.L.S. Commodity Code No. 0531–01.03, FPC Form No. 2. * * *

The Commission's choice of regulatory approach in achieving this result should, of course, be upheld unless it is shown to be an abuse of discretion. *E.g., Wisconsin* v. *Federal Power Commission, supra,* 373 U.S. at 302. Each of the three cases presented the Commission with a somewhat different context in which to measure evidence of nonpermanent prices; it is therefore not surprising, and indeed to be expected, that in each case the Commission had a somewhat different basis for considering such price data and in each instance made a somewhat different use of the evidence.

The sole question presented here, we contend, is whether the use of the evidence constituted an abuse of administrative discretion. To answer that question affirmatively, as did the District of Columbia Circuit, requires a conclusion that the Commission may never

use such data in "in-line" cases if it is less than conclusive evidence of what the price line is. But even the District of Columbia Circuit apparently would not have applied such a rule in *Amerada*. And neither the Ninth Circuit in *UGI* nor the District of Columbia Circuit in *Hawkins* and *Sinclair*, see p. 28, n. 20, *supra*, excluded all price evidence that might be termed "suspect". The Commission's job is to maintain reasonable control in an aspect of its regulatory activities in which there is very little, if any, evidence that admits of certain and unarguable conclusions. Pending the day when full-scale proceedings will be completed in all producing areas, the Commission, in Section 7 proceedings, must engage in a pragmatic task of appraisal and estimation, necessarily less exact in the techniques employed than those which would be used in a full-scale rate proceeding.

We suggest that there is no more reason in this kind of case than in any other—indeed, there is less reason than in most—to inhibit the appropriate application of the Commission's expert judgment by imposing firm restrictions on the type of evidence to be considered. It should suffice that the Commission in each instance had adequate support in the record for its selection or rejection of various items of evidence and appropriately discounted the probative value it attached to those nonpermanent data admitted.[24] The

[24] We recognize of course the propriety of the courts' interventions in such cases as the *UGI* case, *supra*, where the Commission did not attempt to analyze the weight given the prices there held "suspect."

record supports the decisions made here, and the Commission's price determinations should be affirmed.[25]

II. NOTHING IN THESE CASES BARRED THE EXERCISE OF THE COMMISSION'S AUTHORITY TO CONDITION PERMANENT CERTIFICATES UPON THE REFUND OF EXCESSIVE CHARGES PREVIOUSLY COLLECTED

There is a single exception to the rule that a producer may not sell natural gas in interstate commerce for resale without a certificate of public con-

[25] Superior Oil Company's contention that the 16 cent and 17 cent in-line prices determined in *Hawkins* for Texas District 3 sales are too low (Pet. in No. 231, pp. 6–8, 9–11) is based principally on the view the Commission erroneously discounted the significance of some nine 20 cent sales that had been permanently certificated in proceedings that were no longer subject to review. The Commission explained that it regarded these sales as without substantial probative value because they were certificated prior to this Court's decision in *Catco*, in proceedings in which certain of the seaboard interests had been improperly denied the right to participate (III R. 6785, 7296). The Commission noted (III R. 7296) that the failure of the seaboard interests to pursue their challenge of those certifications was due solely to a procedural technicality and in no way suggests that the 20 cent prices would have been approved on the merits in a fully contested proceeding. As the District of Columbia Circuit held (IV R. 4315–4316), the Commission is not required to perpetuate in different proceedings involving different parties a past error merely because that error was allowed to pass uncorrected at the time of its occurrence. Accord *Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510, 522 (C.A. 5), pending on petitions for certiorari, Nos. 504, 520, 526 and 628, this Term.

There is an equal lack of merit to Superior's argument (Pet. in No. 231, p. 4), not made in the court below, that the Commission erred in basing its District No. 3 in-line price determinations upon a record which included evidence of sales that had been certificated at prices of less than 14 cents per Mcf. The sales in question are permanently certificated and entitled

venience and necessity obtained from the Federal Power Commission after hearing. A producer faced with an "emergency" may obtain permission to make a "jurisdictional" sale without securing a permanent certificate of public convenience and necessity and, by the same token, without having his proposed price subjected to the scrutiny of a public hearing.

The temporary certificate is, however, precisely that—"temporary" and nothing more. Sales under it may continue only during pendency of the application for a permanent certificate. The issuance of a temporary certificate must be followed by public hearings on an application for a permanent certificate—after which the Commission will determine, *inter alia,* the in-line price consistent with the public convenience and necessity and condition any permanent certificate on compliance with that price.

Not uncommonly, the in-line price determined after a full adversary hearing is appreciably lower than the price allowed in the temporary authorization issued on the basis of the producer's *ex parte* representation of emergency. That is what happened here. By definition, then, in circumstances such as these cases present, producers have been able to collect under temporary certificates more than the public interest

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to the full weight given them. The Fifth Circuit, in *Continental, supra,* has expressly approved the inclusion of such sales in the price evidence relied upon by the Commission there. 378 F. 2d 510, 519–520. In any event, Superior did not make its present objection in its petition for rehearing to the Commission. Accordingly, Section 19(b) of the Act bars consideration of this claim. *E.g., Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 307.

(as ultimately determined) allows. The producers do not challenge the general proposition that the Commission may order refunds representing the difference between their *ex parte* prices and the in-line price. Their view, which the Tenth Circuit accepted, is that no refunds may be ordered unless the temporary certificate expressly warned of the possibility. Neither the producers nor the Tenth Circuit have explained why the producers should have such "a windfall * * * with a consequent squall for the consumers," [26] where they are unable to show specific harm incurred in reliance upon the wording of the temporary certificate.[27] We submit that the producers are entitled to no more than an opportunity to show such a justifiable and detrimental reliance as would make a refund order inequitable—an opportunity they had here and exercised, without being able to convince the Commission of the alleged unfairness of the refunds actually ordered.[28]

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[26] *Catco*, 360 U.S. at 390.

[27] As to the wording of the temporary certificates, see p. 6, n. 2, *supra*, and pp. 42–43, *infra*.

[28] As noted above, see p. 12, n. 12, *supra*, the seaboard interests, at the start of the *Amerada* hearings, asked the Commission to add an express refund condition to the temporary certificates. In the Tenth Circuit, the producers suggested that the Commission's order denying that motion was a final, reviewable order and was thus res judicata as to the refund issue in the *Amerada* proceedings. The court disagreed, recognizing that the Commission had not then purported finally to decide the refund issue (I R. 6734–6735). This was plainly correct. The motion in question made it clear (I R. 5063) that the relief requested, *i.e.*, the imposition of an express condition in existing temporary authorization that monies thereafter collected would be subject to refund, was intended to afford consumers supplemental protection. But it plainly saved the broader contention of the seaboard interests

A. THE COMMISSION HAS THE AUTHORITY TO CONDITION PERMANENT CERTIFICATES BY REQUIRING APPROPRIATE REFUNDS EVEN THOUGH SERVICE WAS INITIATED UNDER A TEMPORARY CERTIFICATE THAT LACKED AN EXPRESS REFUND CONDITION

Section 7(e) of the Natural Gas Act authorizes the Commission to attach "reasonable terms and conditions" to its certificates of public convenience and necessity. The conditioning power is in terms unlimited; it may be invoked whenever and however "the public convenience and necessity may require." This Court has construed the power broadly in order to advance the fundamental objective of the Act—the protection of the consumer against excessive gas prices pending the determination of just and reasonable rates. *Catco, supra.* Surely, the most compelling demonstration must underlie a conclusion that the Commission may not give the public the protection of a refund of excessive amounts collected under temporary authority issued at a producer's *ex parte* behest.

There is plainly no statutory bar to refunds here. This was made clear in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223. This Court held that the Commission could order the refund of excess charges collected under the terms of a permanent certificate which contained no express refund obligation when, as a consequence of judicial review, the courts invalidated the price approved in that certificate as unduly high. Here, as in *Callery,* the pro-

in *Skelly*, then pending before the Commission on rehearing, that an express refund condition was not a prerequisite to refunds. The failure to seek review therefore meant at most that the distributors had decided to forgo the supplemental protection that a new condition might provide.

ducers have "sold their gas at prices exceeding those properly determined to be in the public interest." 382 U.S. at 230. That the sales here were under a temporary certificate is not, as the Tenth Circuit asserted (I R. 6736–6737), a distinguishing factor. On the contrary, there is more reason to order refunds where the excessive prices resulted from summary action on the *ex parte* "emergency" request of producers, rather than after the conclusion of an adversary proceeding. Temporary authority plainly has a lesser—not a greater—claim to the attributes of finality. Thus, the teaching of the *Callery* case—that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order" (382 U.S. at 229)—applies *a fortiori*.

Nor was the Commission's power to order refunds nullified by the failure of the temporary certificate to give the producer explicit warning that he might be required, as a condition of obtaining a permanent certificate, to refund past charges found to be excessive.[29] As noted above, temporary certificates are merely *pendente lite* authorizations intended to provide interim relief to producers who might otherwise lose gas. By definition, they are non-final and they confer no vested interest. Moreover, each temporary certificate recited expressly that it did not constitute

[29] Sun, in opposing the grant of certiorari, mistakenly suggested that this Court believed that the producers in *Callery* had received such a warning. To be sure, the Court referred (382 U.S. at 226) to a Commission order issued on January 10, 1962, which advised producers that they might be required to make refunds with respect to the *Callery* sales. But the opinion also shows (382 U.S. at 225) that the refunds in *Callery* related back to the time service was initiated, several years before the 1962 order.

approval of any rate or charge. The Commission said, "[N]or shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding"—a disposition to be made "as the record may require" (*e.g.*, I R. 4147).[30] As the Fifth Circuit has said in rejecting the conclusion reached here by the Tenth Circuit (*Continental Oil Co.* v. *Federal Power Commission,* 378 F. 2d 516, 532, petitions for certiorari pending, Nos. 504, 520, 526 and 628, this Term):

> * * * The Producers knew that the authorizations they received were *temporary;* granted *ex parte* to provide interim relief. The contingency of the temporaries was made known to the recipients by * * * language * * * sufficient in our opinion to put the Producers on notice of the possibility that refunds of excessive amounts might ultimately be required so that no higher price might be retained than the Producer was entitled to receive under a properly conditioned permanent certificate.

The Tenth Circuit reasoned (I R. 6741) "that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance." Stability, however, is but one factor in determining where the public interest lies and obviously cannot be made paramount on the basis of *ex parte* claims of emergency,

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[30] In eight of the sales that were involved in the review proceeding in the court below, the temporary certificates had specified a refund obligation (I R. 5358).

where "the public, the consumers, the distributors [and] the pipelines" have had no forum in which to contend for a particular level of stability. Moreover, it was not for the court of appeals to assume, as it did, the function of weighing the "protection of the consumer interests * * * against the desirability of the maintenance of an adequate supply of gas," and decide, as it also did, that a "repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers" (I R. 6735). These matters—to the extent that they are pertinent in effecting the congressional command (Section 7 (c)) to defend the public interest—are to be evaluated, at least in the first instance, by the Commission. If equities are to be weighed, the Commission is charged with management of the scales.

The Tenth Circuit, in short, has forbidden the Commission to exercise its discretion in determining how particular refunds in particular cases will affect producers and consumers. Acceptance of that result would convert temporary authorizations into limited-term permanent certificates, not subject to scrutiny in light of the public interest. Concededly, the Commission should consider whether a producer justifiably relied, to his detriment, upon the lack of an explicit refund condition in a temporary certificate issued him. There may be instances where a producer could show some irretrievable out-of-pocket expense resulting from justified reliance on the price set in the temporary certificate. But it is one thing to say that in

determining the measure of refund in a particular case equitable circumstances favoring the producer are entitled to weight; it is quite another to say that, whatever the facts and circumstances bearing upon the respective equities, the Commission is foreclosed from requiring any refund unless it has forewarned the producer in explicit terms. Neither the language nor the purpose of the statute justifies so inflexible a limitation upon the agency's discretion. The point has been convincingly stated by both the District of Columbia and Fifth Circuits in *Skelly* and *Continental* (329 F. 2d at 249; 378 F. 2d at 529):

> * * * The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

large and without particularization of the facts or the extent of their reliance.[34] They contended, for example, that their financial stability and planning for exploration required their retention of excess rates collected under their temporary certificates.[35] But, as the Commission has observed in *Skelly*, on remand, 35 F.P.C. at 853, "it is equally clear that temporary authorizations are not and could never be a vehicle for assuring such stability * * *." No rational businessman is likely to rest his financial plans on a temporary certificate that is intended to be transitory and specifically indicates that it is granted without prejudice to whatever final disposition the record ultimately might require. The producers must have known that the Commission could—and often did—find after hearing a price line below the temporary, *ex parte* charge, and that a con-

[34] The producers also claimed total immunity from refunds because of the possibility that State regulatory agencies would not take the action necessary to see that the refunds reached the consuming public (*e.g.*, II R. 6475–6476). The Commission acted reasonably in not viewing this as a ground for relieving the producers of their refund obligation. As pointed out in *Skelly*, on remand, 35 F.P.C. at 855, the Commission can only act within its own jurisdictional reach. The distributors (*ibid.*), "are within the control of their local state regulating agencies, and it is these agencies who are responsible for seeing that the benefits of these refunds reach the proper parties." There is certainly no reason for the Commission to fail to discharge its responsibility to the consumer on the assumption that the States might not do their part.

[35] Two of the largest producers in the United States—Texaco and Humble—ordered to refund $1500 and $25,000 respectively, asserted that the effect of refunds on their budgeting and planning would be "disastrous." (II R. 6233, 6318). Standard Oil of Texas, which had the largest refund liability in *Amerada* (about $700,000), made no such argument.

sumer challenge to the prices—and a demand for refund—was probable.[36]

Surely the burden was upon the producers to demonstrate convincingly a justification for the retention of amounts exceeding the in-line rate. Whatever facts might justify that result were peculiarly within their knowledge. They made no specific showing, however, save for the unrecoverable royalties and tax payments of which the Commission took account.

Two other factors figure importantly in an appraisal of the equities. *First,* the producers obtained an immediate and substantial benefit from the grant of temporary authorizations in advance of notice and hearing: avoidance of the loss—such as the loss of gas by drainage or flaring—which prompted their applications.[37] *Secondly,* consumers have suffered a direct and measurable loss: the payment of amounts in excess of the in-line rate. From the date of issuance of

[36] The Commission has recognized exceptional circumstances when they have been adequately shown. Thus, in *Turnbull & Zoch Drilling Co.*, 36 F.P.C. at 166–167 (Opinion 499), the Commission authorized Jonnell Gas, Inc. to work out its refund obligations over a period of time to avoid the deleterious impact of a large refund upon a smaller producer. In this case, one producer respondent, Patchin-Wilmoth Industries, Inc., asked total relief from refund liability because the well in question proved less productive than expected. The Commission reasonably found the position unjustified (II R. 6429). Some small producers in this case also argued that they should be exempt as a class because of their size, a contention previously rejected in *Skelly*, on remand, 36 F.P.C. at 145.

[37] The emergencies in the present cases were for the most part economic hardship, including loss of leases, drainage, the payment of shut-in royalties, as well as two instances of flaring (I R. 4115, 4206, 4249, 4471).

the temporary certificates until the decision setting the price line, the public paid more than the "public convenience and necessity" warranted. To the extent that the consuming public is denied refunds, it will be out-of-pocket as a result of the producers' *ex parte* claims of emergency.

On this record, we submit that the refund order was reasonable—fair to the producers and in the public interest.[38]

III. THE COMMISSION'S RULING THAT THE "NEED" ISSUE SHOULD RECEIVE PLENARY CONSIDERATION IN PIPELINE PROCEEDINGS, RATHER THAN IN THESE PRODUCER CASES, WAS A REASONABLE METHOD OF CONTROLLING THE DISPATCH OF THE AGENCY'S BUSINESS

In *Hawkins* and *Sinclair*, the New York Public Service Commission opposed the issuance of permanent certificates on the ground that the producers had not established a public need for the gas in question. The argument turned on the assertion that the contractual commitments of most of the pipelines purchasing the gas here involved—their so-called "take-or-pay" positions[39]—demonstrated that there was no

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[38] The Commission rejected, as this Court later did in *Callery*, 382 U.S. at 230, producer contentions that the "just and reasonable" price, yet to be determined, rather than the in-line price, was the proper measure of refunds. Interest was also imposed, a practice approved in *Callery*, *ibid.*, at the rates of 6 and 7 percent (II R. 6227), amounts expressly approved by the Fifth Circuit (*Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157) and the District of Columbia Circuit (IV R. 4317). This Court should therefore affirm these two aspects of the Commission's order.

[39] A "take-or-pay" provision requires a pipeline, over a specified period, to take an average quantity of gas or pay for it. A

need for additional purchases. In each proceeding the Commission concluded that New York had failed to support its contention and that in any event such a claim would better be decided in dealing with pipeline proceedings (III R. 7293, IV R. 4185). The Court of Appeals for the District of Columbia Circuit held (IV R. 4298, 4301) that the Commission should have "determine[d] the issue of need *before* the initial sale to a pipeline" and "*before* [the Commission] * * * grants a permanent certificate to a producer." (Emphasis in original.)

We submit that the court of appeals has overlooked a crucial consideration—that an independent producer cannot sell gas for resale in interstate commerce unless the Commission has at some point authorized the construction of facilities that the pipeline company requires to receive the gas. Producer sales, of course, contemplate transmission of the gas to consumers through pipelines. Before the producer can begin his sales, pipeline facilities must be connected. The construction and expansion of pipeline facilities—

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make-up period is also provided during which the pipeline can take, without additional payments, the gas previously paid for but not taken. The amounts paid for gas which has not yet been taken are termed prepayments. They are capitalized and included in the pipeline rate base. In addition, if the gas paid for but not taken cannot subsequently be made up, consumers might be required to absorb the pipeline's loss on the gas not taken. Experience has shown, however, that pipelines have almost always been able to take the gas without forfeiting prepayments. The Commission recently issued a rule requiring a five-year minimum make-up period in new contracts and those certificated in various cases since 1961, which includes all in issue here. *Order No. 334*, 37 F.P.C. 110.

including the addition of connections for new purchases—are subject to the continuing regulatory supervision of the Commission. The result is that in a variety of ways—both immediate and continuing—the take-or-pay position, and all other factors affecting the needs of every pipeline, are subject to continual Commission study through proceedings and reporting requirements aimed directly at the pipelines.

The needs of the pipelines for gas are presented to the Commission in several ways. The primary method is an application by a pipeline seeking a certificate of public convenience and necessity for new or expanded transportation facilities. Such a certificate is granted only after notice and plenary consideration of many issues peculiar to pipelines, including a comprehensive study of supplies from all sources and the needs of all the pipeline's customers.[40] Another method is the annual authorization that most pipelines have—so-called "budget" authority. This allows expenditure of the lesser of $5,000,000 or 1.5 percent of the existing plant investment on new pipeline gas-purchasing facilities, without further Commission approval.[41] The

[40] See, *e.g.*, *Transwestern Pipeline Co.*, 36 F.P.C. 176, 191–199, pending on petition for review *sub nom. Southern California Edison Co.* v. *Federal Power Commission*, C.A. 3, No. 16434; *Transcontinental Gas Pipe Line Corp.*, F.P.C. Docket No. CP65–181 (Phase II), Opinion 532, November 6, 1967. See, also, *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, upholding the Commission's refusal to certificate a pipeline project designed to make large volumes of gas available on the eastern seaboard for use as boiler fuel (see IV R. 4298, n. 22).

[41] See Regulations under the Natural Gas Act, Section 157.7(b), 18 C.F.R. 157.7(b). The total cost of any single gas purchase project cannot exceed 25 percent of the total budget amount, or $500,000, whichever is the lesser. *Ibid.*

budget authority is granted on application, and only after public notice and opportunity for objection is given.[42] The Commission also requires periodic reports from all pipelines.[43] The Commission, from its various sources, receives, on a continuing basis, necessary data about the supply and demand, and makes the information available to the public.[44]

The net of it is that the needs of all of the pipelines are subjected to a process of continuing surveillance by the Commission. Since New York has claimed that the Commission has failed to take account of the allegedly unfavorable take-or-pay situation of the pipelines, we point out further that the Commission has, since 1961, expressly conditioned permanent certificates issued to producers on acceptance of whatever rule should be established in the agency's comprehensive take-or-pay study. Such a condition was imposed here. (I R. 5795, III R. 7304, IV R. 4192.)[45]

These Commission activities give consumer interests a variety of opportunities to present their con-

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[42] *Id.* §§ 157.9 *et seq.* Annual Reports are made to the Commission describing the prior year's construction. *Id.* § 157.7(b)(3).

[43] See, *e.g.*, Regulations under the Natural Gas Act, Section 260.7, 18 C.F.R. 260.7. The Commission has stated that the information so furnished may be relied upon in support of pipeline expansions.

[44] Detailed compilations of the material furnished have been published in Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1963 and 1964" (February 1966); Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1964 and 1965" (August 1967).

[45] See Order No. 334, discussed at pp. 50–51, n. 39, *supra*.

B. THE COMMISSION APPROPRIATELY CONCLUDED THAT EQUITABLE CONSIDERATIONS REQUIRED REFUNDS OF MOST OF THE EXCESSIVE AMOUNTS COLLECTED DURING THE PERIOD OF TEMPORARY AUTHORIZATION [31]

In its *Amerada* decision establishing in-line prices for District 4, the Commission recognized that the hearing on the permanent certificates had been conducted prior to the court of appeals holding in *Public Service Commission of New York* v. *Federal Power Commission* (*Skelly*), *supra*, that the absence of an express provision in the temporary certificate could not, as the Commission had there held, preclude the ordering of refunds if it was otherwise equitable to do so. The Commission accordingly deferred decision of the refund question to allow the parties further opportunity for briefing, with the decision to turn on the "standard of equity * * *" (I R. 5792).

After full briefing, the Commission determined that the producers should be exempted from making refunds only to the extent to which unrecoverable ex-

[31] Because the Tenth Circuit held that the Commission had no authority to require refunds, the court did not consider the producers' further objections that the refund requirement actually imposed by the Commission in Opinion 501 was not reasonable. In our petition in No. 80 (p. 4, n. 1) we expressly reserved the right to argue this question so that the Court would be in a position to decide the entire case. We submit that the circumstances of the present case warrant this Court's resolution of this issue at the present time, without remand to the court below for initial consideration. Compare *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 226–227; *Federal Power Commission* v. *Southern Cal. Edison Co.*, 376 U.S. 205; *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114.

penditures could be said to have been made because of their assumption, made in light of the Commission's previous holdings, that no refunds would be ordered. The Commission accepted the factual "statements of the producers in their briefs * * * at face value" (II R. 6227) for the purpose of deciding whether such expenditures had occurred. See also *Skelly*, on remand, 36 F.P.C. 143, 144.[32] Even so, the only such expenditures were royalty payments and some Texas production taxes. As a consequence, the Commission ordered a refund on all collections above the 16 cents per Mcf in-line price, with the exception of royalties and production taxes paid prior to February 1, 1964.[33]

Apart from these two items—royalties and production taxes—the producers claimed detriment, in the

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[32] Although *Amerada* is the first Commission order requiring refunds for sales under such temporaries to reach this Court, the principle was first applied about two months earlier in the Commission's order on remand of *Skelly* from the District of Columbia Circuit. See *Skelly Oil Co.*, 35 F.P.C. 849 (Commission Opinion 492), rehearing denied, 36 F.P.C. 143, pending on review, C.A. 10, Nos. 9000, *et al.* Refund obligations have also been imposed in such circumstances in *H. L. Hawkins*, 36 F.P.C. 149 (Opinion 498), rehearing denied, 36 F.P.C. 981, pending on review, C.A. 10, Nos. 9220, *et al.*; and in *Turnbull & Zoch Drilling Co.*, 36 F.P.C. 164 (Opinion 499), pending on rehearing before the Commission.

[33] The Commission concluded that producers would have to refund monies representing royalties or State production taxes paid after February 1, 1964, because this date was one week after the court of appeals' decision in *Skelly* that refunds might be ordered absent an express condition. The Commission's view (II R. 6226, 6427–6428) was that no producer could thereafter reasonably have relied on a belief that refunds might not be ordered. See, also, *H. L. Hawkins*, 36 F.P.C. at 152.

tentions, and all the evidence they command, in circumstances that allow examination of the overall supplies of individual pipelines. The New York Commission in fact participated in two pipeline cases growing out of the producer applications in issue here.

In one instance, the application for intervention was first denied for want of standing, since it involved gas destined for Florida markets. See *Coastal Transmission Corp.*, 23 F.P.C. 752. After the District of Columbia Circuit reversed,[46] and intervention was allowed,[47] New York made no objection to the grant of a certificate to the pipeline.

In the other case, the Commission found that United Gas Pipe Line Co., the pipeline purchaser of the gas sold to Lone Star Gathering Company in the *Sinclair* proceeding, had the requisite need. *Lone Star Gas Co.*, 36 F.P.C. 497, 501, 502. Subsequently, on rehearing granted to re-examine the need issue, the Commission allowed Lone Star and its 17 suppliers to abandon the sales—not because of a lack of need, but because the producers' reserves proved inadequate. See *Lone Star Gas Co., et al.*, Docket Nos. CP65–118, *et al.*, order issued September 15, 1967; *Logue and Patterson, et al.*, Docket Nos. CI67–1231, *et al.*, order issued September 15, 1967. See also *Lone Star Gas Co., et al.*, Docket Nos. CP65–118, *et al.*, order issued October 30, 1967.

Moreover, in both *Sinclair* and *Hawkins* the New York Commission was afforded the opportunity to

[46] *Public Serv. Com'n of State of N.Y.* v. *Federal Power Commission*, 295 F. 2d 140, certiorari denied *sub nom. Shell Oil Co.* v. *Federal Power Commission*, 368 U.S. 948.

[47] *Coastal Transmission Corp.*, 26 F.P.C. 531.

present evidence of a lack of need to the hearing examiner. In both proceedings it failed to persuade either the examiner or the Power Commission of the validity of its contention. We disagree with the suggestion of the District of Columbia Circuit that the failure of the New York Commission to mount a persuasive case (and the court does not suggest it did) is excused by the Power Commission's not having given more extensive consideration to the question. Substantial information about each pipeline's take-or-pay situation, and its overall supplies and sales, were publicly available. The Commission, moreover, has made very clear its familiarity with and consideration of these data (III R. 7293): "[B]ecause of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for [the] future, even though the supplies may be slightly in excess of their present-day needs." At no point has New York offered any factual basis for finding error in this conclusion.

Thus, the Commission procedure differs from the prescription of the District of Columbia Circuit only in that the agency characteristically makes its primary determination of need in pipeline rather than in producer proceedings. Theoretically, the Commission could have given the question of pipeline need a plenary hearing in each of the producer proceedings now before the Court. However, since the pipelines invariably obtain their gas from large numbers of

producers, determination of their needs must take into account the gas supply and prospective purchases from many sources. To make this an issue in connection with the application of each seller is to invite duplication of effort and multiplication of parties. As the Fifth Circuit pointed out in *Continental Oil Co.* v. *Federal Power Commission, supra,* in refusing to follow the holding of the District of Columbia Circuit here (378 F. 2d at 526):

> Where there are hundreds of producers in § 7 proceedings who cannot have any knowledge of ultimate demand, the result would be either a forced intervention of the pipelines and prolongation of the hearings, or possible collateral attack on the pipeline certificate cases. * * *

With some awareness of these difficulties, the District of Columbia Circuit suggested that the Commission's consideration of need in producer cases need not be detailed and could be based on "studies of its staff" or broad "policy statements." (IV R. 4301). Perhaps that largely removes the sting of the decision. But, if so, it remains difficult to see the substantive gain in protection of consumer interests. The abbreviated study or statement of the purchasers as to need would relate to a subject necessarily considered in greater detail—under the Commission's existing rules—in connection with the pipeline's application for authority to construct facilities for taking additional gas. Such approval is an essential prerequisite to permanent consummation of the sales at issue in the producer proceedings. The Commission, in addition, constantly reviews the supplies of and the de-

mands upon pipelines, since experience has taught that need is a dynamic and not a static question. This being so, we submit that the Commission's approach should be sustained as a reasonable exercise of it discretionary control of its proceedings.

CONCLUSION

The judgments of the Courts of Appeals for the Tenth and District of Columbia Circuits should be reversed, with directions to affirm the orders of the Federal Power Commission.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 60

FEDERAL POWER COMMISSION,

Petitioner

v.

SUNRAY DX OIL COMPANY, *et al.*

No. 61

THE UNITED GAS IMPROVEMENT COMPANY,

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v.

SUNRAY DX OIL COMPANY, *et al.*

No. 62

THE BROOKLYN UNION GAS COMPANY, *et al.*

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FEDERAL POWER COMMISSION, *et al.*

No. 80

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STANDARD OIL COMPANY OF TEXAS,
A Division of Chevron Oil Company, *et al.*

No. 97

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December 13, 1967

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Opinions Below

Each of the captioned cases involves a review of opinions rendered by the Court of Appeals for the Tenth Circuit. In Nos. 60, 61 and 62 (*Sunray DX*), the opinion and dissent-

ing opinion of the Tenth Circuit (I R. 6696-6757) are reported at 370 F. 2d 181; the related Commission Orders, Opinion Nos. 422 and 422-A (I R. 5769-5804, 6031-6038), are reported at 31 FPC 623, 1315. In Nos. 80 and 97 (*Standard*), the *per curiam* opinion of the Tenth Circuit (II R. 6885-6891), is reported at 376 F. 2d 578 and the opinion on rehearing (II R. 6921-6925) is reported at 376 F. 2d 580; the related Commission Orders, Opinion Nos. 501 and 501-A (II R. 6222-6230, 6426-6431), are reported at 36 FPC 309, 962.

Jurisdiction

The judgment of the Court of Appeals in *Sunray DX* was entered on December 9, 1966 (I R. 6758). Timely Petitions for Writs of Certiorari were filed in No. 60 by the Solicitor General on behalf of the Federal Power Commission, in No. 61 by The United Gas Improvement Company and in No. 62 by The Brooklyn Union Gas Company, *et al.*

The judgments of the Court of Appeals in *Standard* were entered on March 27, 1967 (II R. 6892-6902). Timely Petitions for Certiorari were filed in No. 80 on behalf of the Federal Power Commission and in No. 97 by The United Gas Improvement Company.

By order entered October 9, 1967, each of these Petitions was granted and consolidated with Nos. 111, 143, 144 and 231 (I R. 6926-28; II R. 6929-30). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

Statutes And Regulations Involved

The pertinent provisions of the Natural Gas Act [Sections 7(c) and (e), 52 Stat. 821-833 as amended, 15 U.S.C. 717-717w]; the pertinent Regulations Under the Natural Gas Act, 18 C.F.R. Subchapter E; and the Commission's

Statement of General Policy No. 61-1 (18 CFR § 2.56; 24 FPC 818), are set forth in Appendix A, *infra*, pp. 1a-9a.

Questions Presented

1. Whether there is substantial evidence to support the Federal Power Commission's determination of the "in-line" price, which it attached as a condition to permanent certification of the sales of natural gas involved?

2. Whether the Commission may retroactively order refunds of amounts collected under lawfully issued temporary certificates when, pursuant to legal precedent and its established policies, the Commission determined both at the time of issuance of such certificates and upon subsequent reconsideration that no refund liabilities should be imposed?[1]

Statement

This case involves orders of the Federal Power Commission (Commission), which granted permanent certificates of public convenience and necessity under Section 7 of the Natural Gas Act authorizing sales of natural gas by certain independent producers (Producers).[2] The Commission's authorization was granted subject to a variety of conditions,

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[1] The additional question purportedly reserved for argument by footnote reservation in No. 80 (p. 4, fn. 1) and raised by Question No. 2 in No. 97 concerns the reasonableness of the Commission's exercise of the disputed refund power in its Opinion Nos. 501 and 501-A. In its second decision below (376 F. 2d 578), the Tenth Circuit did not reach this question in view of its prior determination (370 F. 2d 181) that the Commission lacked a retroactive refund power in the circumstances. The Tenth Circuit made clear, however, that if its disposition of the refund power question were ultimately held to be in error, it is ready to consider the many complex questions, both equitable and legal in nature, which have been raised below concerning the propriety of the Commission's exercise of such power.

[2] This brief is being filed by twelve of those producers who have been named respondents in Nos. 60-62, 80 and 97.

two of which are pertinent here. First, it imposed a condition prohibiting the collection of an initial price higher than 16 cents per Mcf from and after the issuance of the permanent certificates. Second, the Commission imposed refund liabilities retroactively upon those Producers who had previously begun the sales in question under temporary certificates, issued without refund conditions, authorizing the collection of prices higher than 16 cents during the period of temporary certification.

The court below held that substantial evidence supported the prospective price condition imposed by the Commission. However, it held that the Commission lacked the power, in the circumstances presented, to impose refund liabilities retroactively upon Producers' collections under these temporary certificates.

Petitioners here, in addition to the Commission (Nos. 60, 80), are four natural gas distribution companies[3] and the Public Service Commission of the State of New York (Nos. 61, 62, 97).[4]

The Commission Proceedings

All of the Producer sales involved are made from fields in Texas Railroad District No. 4[5] under contracts executed during the 1960-62 period subsequent to the issuance of the Commission's *Statement of General Policy No. 61-1,*

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[3] The United Gas Improvement Company, The Brooklyn Union Gas Company, Long Island Lighting Company and Philadelphia Electric Company.

[4] Petitioners in Nos. 61, 62 and 97 will be collectively referred to as Distributors.

[5] The Texas Railroad Commission has divided the various producing areas in the State of Texas into districts for regulatory purposes. Texas District No. 4 is a producing area at the southern tip of Texas, composed of 15 counties.

18 CFR § 2.56, 24 FPC 818 (1960).[6] This *Policy Statement* was designed to implement the area approach to independent producer regulation during the interim period prior to the establishment of just and reasonable rates. The Commission there established maximum acceptable rates for initial prices in new contracts to serve as a guide to it and interested parties in determining whether proposed initial prices should be certificated without a price condition. The initial price level for new contracts in Texas District No. 4 was set at 18 cents per Mcf.[7] The initial prices in Producers' contracts ranged from 15.9 cents to 19.8 cents per Mcf (I R. 5320-21).

Upon the filing of their respective certificate applications,[8] Producers individually sought temporary certification of their proposed sales pursuant to Section 7(c) of the Natural Gas Act. By separate orders, the Commission granted temporary certificates imposing price conditions, where required, to insure that Producers' initial prices did not exceed the *Policy Statement* level. Eight of these orders were conditioned to require the Producer involved to make refunds dependent upon the terms of the permanent certificate ultimately issued (*e.g.*, I R. 5312-13). The remaining temporary certificate orders contained no such refund con-

[6] The *Policy Statement* was published in the Federal Register on October 5, 1960 (25 F.R. 9578), and was codified in the Code of Federal Regulations (18 CFR § 2.56).

[7] The 18-cent *Policy Statement* rate remained in effect for nearly two years until the Commission issued its *Fifth Amendment to Statement of General Policy No. 61-1* on August 30, 1962, effective that day, announcing a 16-cent initial rate level for new contracts in Texas District No. 4 (28 FPC 441). All of Producers' contracts were executed prior to August 30, 1962 (IR. 5319).

[8] Each of these applications, pursuant to Section 157.25 of the Commission's Regulations (18 CFR § 157.25), included a copy of the related gas sales disclosing the terms upon which the sale was proposed to be made.

dition or any forewarning[9] that the particular price authorized by the Commission was subject to a possible refund liability at a later time (*e.g.*, I R. 4338, 4346-47).[10]

Subsequently, certain of the Distributors[11] requested the Commission either to set aside those of its orders which had granted temporary certificates without refund condition or to modify them by the imposition of refund conditions. Producers opposed this motion. By its order of February 5, 1963, the Commission denied Distributors' motion. Finding that it had authorized these sales "without condition as to refund" and that Producers had acted "in justifiable reliance" upon such authorizations, the Commission refused to place more stringent conditions upon them after having induced Producers to dedicate their gas to the interstate market under the temporary certificates as issued. The Commission held that it would be "contrary to the public interest, as well as inequitable," to so condition these temporary certificates. Equally important, the Commission concluded that the grant of Distributors' motion "would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (I R. 5305-07). Distributors did not seek judicial review of this order or of the temporary certificate orders themselves.

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[9] All of the temporary certificate orders, both conditioned and unconditioned, contained a routine provision indicating that they were issued "without prejudice" to whatever conditions the Commission might prospectively impose upon the permanent certificates ultimately issued.

[10] The Commission's orders granting these temporary certificates are not before the Court for review. It is the Commission's subsequent orders, retroactively imposing refund liabilities, which are at issue here.

[11] Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company.

On August 30, 1962, the Commission consolidated for hearing Producers' applications for permanent certification of these sales (I R. 4636-40). Therein, the Commission stated that the purpose of the hearing would be to determine the appropriate price at which Producers' sales should be permanently certificated.[12] At the hearing, Producers offered to prove the propriety of their initial contract prices by cost, geological, supply-demand and economic evidence. However, at the urging of Distributors and the Commission's Staff, this evidence was excluded by the Presiding Examiner on the ground that it was not relevant to a price line determination in a producer certificate proceeding (I R. 5085-5107). The Examiner's exclusionary ruling was later affirmed by the Commission (I R. 5781).

With the scope of the hearing thus limited, the Presiding Examiner received the testimony of various Producer witnesses explaining how the Commission's *Policy Statement* had substantially influenced the negotiation of their gas sales contracts. This testimony also showed that, relying upon the *Policy Statement,* Producers had decided to forego additional negotiations with prospective buyers in an effort to obtain either a higher price or an intrastate market for the gas (I R. 415-16, 428-29, 442-43, 483-85, 787-89, 1043-44). This evidence stands unchallenged.

The Presiding Examiner also received in evidence Exhibit No. 16, sponsored by a Commission Staff witness, which analyzed certain provisions of all Texas District No. 4 contracts, dated 1955 and later, which had been permanently or temporarily certificated (I R. 1073-74, 1600-25).

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[12] For gas produced in Texas District No. 4 under contracts executed prior to the issuance of the *Policy Statement* the Commission had previously determined 15 cents per Mcf to be the proper price line for permanent certification, *Skelly Oil Company,* 28 FPC 401, 412 (1962).

Following the hearing and the Examiner's initial decision, the Commission issued its Opinion No. 422 on March 23, 1964 (I R. 5769-5804; 31 FPC 623). First, it concluded that the relevant time period for making its price line determination should be from September 28, 1960, the date of the *Policy Statement,* until August 30, 1962. This was the period during which Producers' contracts had been executed. Second, it considered and weighed the price line evidence sponsored by its Staff and, largely on the basis of it, concluded that the "in-line" price for the contracts in question was 16 cents per Mcf. The Commission also recognized that its affirmance of the Examiner's ruling excluding Producers' proffered cost and financial requirements evidence made it particularly incumbent upon the Commission "to give special consideration to the field price evidence as to shifts in the pricing line". (I R. 5781). Noting further that a major issue in this case is the effect of its *Policy Statement* upon the initial prices in contracts executed thereafter, it found that the issuance of the *Policy Statement* had had the effect of holding down contract prices to the *Policy Statement* level (I R. 5788). Accordingly, the Commission concluded that in fixing the in-line price level it could not disregard its own *Policy Statement* and its "effectiveness as a ceiling on prices in contracts executed after its issuance" (I R. 5789).

In making its price line determination, the Commission found that, unlike any price line determination it had previously made, the record revealed that during the relevant time period there were not substantial volumes of gas moving under permanent certificates in Texas District No. 4. Indeed, the Commission found that it would be manifestly improper to base its price line determination in this case solely upon the "few isolated and inherently nonrepresentative" sales which had been permanently certificated (I

R. 5784). In these circumstances, it concluded that some weight should be accorded to the evidence concerning sales made under temporary certificates. Otherwise, the Commission's price line determination would not be based upon substantial volumes of gas moving in interstate commerce (I R. 5783).

Based upon its "in-line" price determination of 16 cents per Mcf, the Commission issued permanent certificates to Producers conditioned upon the requirement that they charge not more than 16 cents per Mcf thereafter. At the same time, the Commission reopened the question of refund liabilities as to those Producers who had previously begun their sales under temporary certificates which had been "granted without condition as to refund."[13]

While the question of the Commission's power to prescribe refund liabilities retroactively in these circumstances was pending before the court below on review of the Commission's Opinion No. 422, the Commission exercised its claimed refund power in its Opinion No. 501, issued July 27, 1966 (II R. 6223-30).

The Decisions Below

Upon review of Opinion No. 422, the court below concluded that substantial evidence supported the Commission's 16-cent "in-line" determination. However, it held that the Commission could not, in the circumstances of this case, impose refund liabilities retroactively upon those Producers who had collected prices in excess of 16 cents per Mcf under temporary certificates which made no provision for refunds.

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[13] The quoted language is from the Commission's order of February 5, 1963 (I R. 5305). The Commission made no evaluation of the effect of this order when it issued its permanent certificate order on March 23, 1964.

Thereafter, on review of Opinion No. 501 the court below, upon motion for summary disposition filed by Standard Oil Company of Texas, without briefing or argument, reiterated by *per curiam* orders its holding that the Commission could not lawfully order refunds. In so doing, it did not reach the subsidiary questions of whether, assuming *arguendo* the Commission could lawfully order refunds, it had properly exercised any such refund power under the variety of equitable circumstances presented. On rehearing of its summary disposition of Opinion No. 501, the court below stated that if its holding that the Commission lacked a refund power in the circumstances were held to be erroneous, it would then be ready to consider whether the Commission had properly exercised that power (II R. 6921-25).

SUMMARY OF ARGUMENT

I. The Price Line Question

This case presents for review the in-line pricing methods adopted by the Federal Power Commission in implementing this Court's admonition in *CATCO*[13a] that "careful scrutiny" be given the price levels at which producer sales are permanently certificated in interstate commerce. The sales at issue were all executed in the early 1960's from Texas Railroad Commission District No. 4 after the Commission had promulgated its *Statement of General Policy No. 61-1 (Policy Statement)* providing guidelines for the interim period of initial rate regulation pending the determination of just and reasonable rates.

In its *Skelly* decision, 28 FPC 401 (1962), the Commission previously established a 15¢ per Mcf in-line price for this same FPC pricing area for contracts executed in the late 1950's. The instant proceeding was convened to examine conditions prevailing in the 1960's to determine if a revision

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[13a] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

in the earlier 15¢ in-line price was required. Based upon the evidence adduced, the Commission found that current conditions in the industry pointed to an in-line price of 16¢ per Mcf. Distributors' position, rejected by the court below, is that the Commission abused its discretion in considering evidence reflective of current conditions in the industry and in failing to mechanically adopt its earlier 15¢ in-line price. This position is without legal or evidentiary support and in conflict with the statutory standard of "present or future public convenience and necessity."

In its development and application of the in-line pricing methodology, the Commission has consistently, with the approval of the courts, taken current conditions into consideration. *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F. 2d 817 at 824 (9th Cir. 1960); *Sohio Petroleum Co.* v. *Federal Power Commission,* 298 F. 2d 465 at 467 (10th Cir. 1961); *Continental Oil Co., et al.* v. *Federal Power Commission,* 378 F. 2d 510, 524 (5th Cir. 1967). Distributors improperly seek to defeat the "current conditions" standard by contending the Commission's price line determination must be based solely upon contemporaneously issued permanent certificates. By contesting all certificate applications at initial prices higher than their predetermined acceptable level of 15¢, Distributors have blocked the issuance of any permanent certificates above such level. They now seek to limit the Commission's price line determination here to a consideration of the isolated number of inherently nonrepresentative sales which have been permanently certificated at or below 15¢. The Commission correctly rejected such an approach finding it would lead to a price freeze at levels having no current relevance and determined solely by the "unreviewable fiat" of Distributors.

In establishing its 16¢ per Mcf in-line price for the post-*Policy Statement* period of the 1960's, the Commission correctly considered not only price levels under contempo-

raneously issued permanent certificates, but also gave some weight to the price levels approved for the substantial volumes of gas moving under contemporaneous temporary certificates. Consideration was also given to the applicable *Policy Statement* price level for Texas District No. 4. Each of the relevant factors was carefully evaluated in light of the Commission's expertise developed in the handling of thousands of producer certificate applications. In making an in-line price determination, the Commission has consistently given some measure of weight to price levels approved under temporary certificates as a reflection of current conditions and this procedure has been judicially approved. See, *e.g., Texaco Seaboard Inc.*, 29 FPC 953, 598 (1963); *The Ohio Oil Company*, 27 FPC 551, 553 (1962); *Union Texas Petroleum*, 32 FPC 254, 262 (1964); *Public Service Commission of New York* v. *FPC*, 329 F.2d 242, 245, (D.C. Cir. 1964). The courts have also approved the Commission's consideration of its *Policy Statement* price levels in making initial price determinations. *Public Service Commission* v. *FPC, supra* at p. 247; *J. M. Huber Corporation* v. *FPC*, 294 F. 2d 568 (3rd Cir. 1961). The Commission's expertise and informed judgment in evaluating the various types of evidence and balancing conflicting considerations is entitled to considerable respect and deference in a proceeding of this nature. *People of the State of California* v. *Federal Power Commission*, 353 F. 2d 16, 23 (9th Cir. 1965).

The factual findings made by the Commission are supported by substantial evidence and require the establishment of an in-line price no less than 16¢. The Commission specifically found the weighted average price for relevant sales to be in excess of 17.176¢ per Mcf (I R. 5786). It further found that "• • • the sales at prices of 16 cents per Mcf or above account for fully 82 percent of the gas presently moving in interstate commerce under contracts executed in

the time period here under consideration" (I R. 5786). In light of this and other considerations it therefore adopted a 16¢ price line which it found to be "* * * the *lowest* price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question * * *" (I R. 5789). On the other hand, Distributors adduced no evidence in support of their contention that the Commission's previously determined 15¢ in-line price should be frozen for an indefinite period into the future. Indeed, the record evidence relied upon by the Commission clearly indicated that its earlier price line was no longer relevant in light of changed conditions in the industry.

The lower court's approval of the Commission's revised 16¢ price line should be affirmed.

II. The Refund Question[14]

Producers dedicated their gas to interstate commerce at prices at or below the Commission's *Policy Statement* level under temporary certificates which contained no forewarning that the authorized prices were subject to the possibility of later refund liabilities. Despite its repeated assurances that the authorized prices were firm prices upon which Producers could justifiably rely, the Commission nevertheless imposed retroactive refund liabilities in the guise of a refund condition attached to the permanent certificates issued years later. The court below carefully analyzed the circumstances in which the Commission had granted the temporary certificates as well as the terms of the temporary certificate orders themselves. On the basis of this analysis, the court below held that the Commission could not retro-

[14] The refund question arises only as a result of the decisions below of the United States Court of Appeals for the Tenth Circuit. The Commission and Distributors, petitioners in Nos. 60-62, 80 and 97, raise this question in that context.

actively alter the terms of the temporary certificates and order refunds of amounts which it had previously authorized to be collected thereunder.

Even at the time of its permanent certificate order, issued in March, 1964, the Commission found that these temporary certificate orders had made no provision for refunds (I R. 5791). This finding was in full accord with the Commission's clearly articulated policy that the initial prices collected under these temporary certificates were subject only to prospective modification, if required, at the time of permanent certification. In striking contrast, the present position of the Commission is that these temporary certificate orders were subject to retroactive modification without notice from their inception.

Consequently, an understanding of the rights conferred by these temporary certificate orders is of critical importance. During the administrative proceeding below, Producers applied, on an individual basis, for temporary certificates authorizing the initiation of sales of natural gas produced in Texas District No. 4 under contracts executed subsequent to the Commission's *Statement of General Policy No. 61-1* (24 FPC 818). This *Policy Statement* established initial price standards for various producing areas and was designed to serve as a guide to the Commission and interested parties for certification purposes. While establishing an initial price level of 18 cents per Mcf for Texas District No. 4, the Commission announced to the industry that it would certificate new sales of gas from that area at that level without price condition. In its *Policy Statement,* and thereafter in this case, the Commission made clear that the price standards so established were designed to establish a salutary price stability which balanced the interests of producers and consumers alike

and gave recognition to the needs for certainty of natural gas companies and the public generally (I R. 5307).

The temporary certificates granted to Producers in this case were an implementation of the *Policy Statement*. In each instance, the Producer was authorized to initiate his proposed sale at the initial price in the contract only if it conformed to the *Policy Statement* level of 18 cents. Most of the initial contract prices were below that level. It is clear that these temporary certificates were the product of the Commission's mature consideration. Thus, when Distributors requested the imposition of refund conditions upon the temporary certificates, the Commission refused to do so in a definitive order which explained the many reasons for its refusal (I R. 5305-07). Distributors have never challenged this order, or the temporary certificate orders themselves, all of which are judicially reviewable.

It is not disputed that the Commission possesses broad power to attach reasonable conditions to producer certificates of public convenience and necessity, both temporary and permanent, *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959); *Federal Power Commission* v. *H. L. Hunt,* 376 U.S. 515 (1964). But it is only reasonable to conclude that, armed with such broad power, the Commission must exercise it at the time of authorization so as to permit the producer to know the terms and conditions under which he is dedicating his gas reserves to interstate commerce, *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 270 F. 2d 404 (10th Cir. 1959). The Commission itself has recognized the need for such certainty in this case. Moreover, the clear implication of the Court's recent decision in *Federal Power Commission* v. *H. L. Hunt, supra,* confirms the proposition that if the Commission finds it in the public interest to condition its certificate orders, it should do so when the authorization

is granted. Otherwise, as the Commission concluded in its order of February 5, 1963 in this case, the retroactive imposition of conditions upon certificate authorizations "would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (I R. 5307).

The court below correctly found that price certainty and stability provide important benefits to consumers in assuring the maintenance of an adequate supply of gas:

> "* * * A repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers. We will not speculate on the effect of such repricing on their exploration and development activities. The benefits derived from such costly activities may or may not be of greater value, from the public standpoint, than the few dollars recovered by the home consumer. Perhaps he would rather have an assured supply for his expensive appliances than a modest refund. * * *" (I R. 6735-6); 370 F. 2d at 192-93)

The Commission's imposition of a retroactive refund condition upon Producers' sales made under valid temporary certificate orders is plainly unlawful for various reasons. Its effect, in any event, is to apply on a retroactive basis a change in a well-reasoned Commission policy designed to create price stability in the natural gas industry. The *post hoc* rationalizations by which the Commission now seeks to justify its action here are equally unsound. Before the court below, it went so far as to contend that the temporary certificates in question do, in fact, contain a refund condition by virtue of certain language which is routinely inserted in all temporary certificates which it issues. The court below properly rejected this contention, noting that the Commission had previously refused to interpret this language as a refund condition.

Finally, while conceding that the temporary certificates in question do not provide for refunds, the Commission argues that its retroactive imposition of refund liabilities may be justified as the undoing of "what [was] wrongfully done by virtue of its order," citing *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). This argument is totally inapposite. In contrast to the judicially invalidated certificates in *Callery*, Producers' sales were made pursuant to and in reliance upon valid temporary certificate orders. These orders, as well as the Commission's order of February 5, 1963 herein, were judicially reviewable and, in the absence of review, became binding upon all, including the Commission. To suggest now that these orders, and Producers' reliance upon them, were "wrongful" merely highlights the Commission's attempt to apply retroactively a change in Commission policy.

ARGUMENT

I. THE COMMISSION'S 16¢ IN-LINE PRICE DETERMINATION IS FULLY SUPPORTED BY THE CONTROLLING LEGAL PRECEDENTS AND SUBSTANTIAL EVIDENCE.

A. The Commission Properly Considered Current Conditions

The basic principles underlying the issuance of producer certificates under Section 7 of the Natural Gas Act were established by this Court in *CATCO*.[15] There the Commission was directed to give a "most careful scrutiny" to producer initial price proposals while also evaluating "all factors bearing on the public interest." The imposition of certificate conditions under Section 7(e) was approved where the proposed price is "out of line" or "might result

[15] *Atlantic Refining Co. et al.* v. *Public Service Commission*, 360 U.S. 378 (1959).

in a triggering of general price rises." The opinion in *CATCO*, however, did not define the "line" or fix precise standards by which a determination may be made of whether a price is "in line" or "out of line."

On *CATCO* remand, the Commission first developed the "in-line" methodology for certificating producer sales. *Continental Oil Co., et al.*, 27 FPC 96 (1962). There the Commission concluded that the appropriate price line was to be determined as of the *date of* the sales contract involved, based upon *"comparable"* existing producer prices under which *"substantial* amounts of natural gas were moving in interstate commerce" (27 FPC at 100).

The Commission's purpose in convening the instant proceeding was to determine the appropriate initial price for issuing permanent certificates applicable to producer sales from Texas District No. 4 under contracts executed subsequent to the issuance of its *Statement of General Policy* on September 28, 1960.[16] The Commission previously had reviewed evidence of the in-line price for the above pricing area during the period of the late 1950's and based upon conditions existing at that time issued permanent certificates at initial prices up to 15¢ per Mcf (thousand cubic feet).[17] Recognizing that changing industry conditions might warrant some adjustment in its earlier in-line determination, the Commission instituted the instant proceed-

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[16] For additional discussion of Commission's *Policy Statement* see pp. 29-31, *supra*.

[17] *Skelly Oil Co.*, 28 FPC 401 (1962), *aff'd* as to price line; *Public Service Commission of New York* v. *Federal Power Commission*, 329 F.2d 242 (D.C. Cir. 1964), *cert. denied sub nom.; Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963 (1964).

ing to examine the conditions prevailing in the 1960's.[18] In its order convening this proceeding the Commission stated (I R. 4638):

> "In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15 cent per Mcf price which we found to be the in-line price as of September 28, 1960, the 16 cent per Mcf price which is being adopted as the future area ceiling price for this area, or the 18 cent per Mcf price established [by the *Policy Statement*] on September 28, 1960."

It is axiomatic that *present* conditions in the natural gas industry are the touchstone of "present or future public convenience and necessity," the statutory standard which the Commission is charged to apply by Section 7(e) of the Natural Gas Act. *City of Pittsburgh* v. *FPC*, 237 F. 2d 741, 752 (D. C. Cir., 1956); *American Airlines, Inc.* v. *CAB*, 192 F. 2d 417, 420-21 (D. C. Cir., 1951).

In requesting reversal of the lower court's affirmance of the Commission's 16¢ per Mcf in-line price Distributors are necessarily asking this Court to hold that the Commission should ignore current conditions in the industry and mechanically apply its in-line price determination for an earlier period. Specifically, they contend the Commission should have applied the 15¢ per Mcf price line found appropriate for the 1950's during the entire period (which may run over a decade) prior to the establishment of a "just and reasonable" area rate for Texas District No. 4. Such a price freeze in the face of changed conditions would be

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[18] In its *CATCO* remand the Commission expressly recognized that modifications to its in-line methodology might be required during latter periods following the issuance in 1960 of its *Statement of General Policy* establishing guideline area price levels (27 FPC at 100).

contrary to the public interest and inconsistent with the entire philosophy of initial pricing. As the Commission stated in its order issuing permanent certificates in the instant case:

> "A rule of law that would deprive producers of any opportunity to show that the initial prices in the 1950's did not suffice for the 1960's or, conversely, that would deprive consumer groups of an opportunity to show a decline in the price level, is not fair to the producers or in the long term interest of consumers. Nor is such a rule even suggested by the decisions of the courts . . . It ['holding the line'] does not mean, irrespective of evidence to the contrary, an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish just and reasonable rates." (I R. 5785)

The courts have recognized that a price line determination by the Commission should reflect current conditions and must change when such conditions change. Before the Ninth Circuit, The United Gas Improvement Company, one of the petitioners here, argued in effect that current conditions need not be considered.[19] The Court of Appeals emphatically disagreed:

> "As previously indicated, *the price line is intended to reflect current conditions in the industry.* Therefore, comparable prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. *The limitation urged by UGI could well defeat this objective* by restricting the comparison to a small number of contracts under which little gas moves today. *It could, in fact, require a rollback to prices having no current relevancy*" (283 F. 2d at 824).[20]

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[19] *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, *cert. denied sub nom., California Co.* v. *United Gas Improvement Company*, 365 U.S. 881 (1961).

[20] All emphasis herein supplied unless otherwise indicated.

Other Circuits have uniformly upheld the Commission's attempt in Section 7 certificate proceedings to look to the *present* — rather than the *past* — in applying the statutory standard of present or future public convenience and necessity. In approving a revision of the in-line price to reflect changed conditions during the post-*Policy Statement* period, the Fifth Circuit in *Continental Oil Co., et al.* v. *Federal Power Commission, et al.*, 378 F. 2d 510 (1967),[21] quoted with approval the holding of the court below:

> ". . . The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.
>
> "The Commission has recognized that the in-line price *must reflect current conditions.* The Courts of Appeals have agreed. Further support is found in the *Callery* decision where the Supreme Court referred to 'other contemporaneous certificates' and 'prices higher other existing levels . . .'" (378 F. 2d at 524).

In *Sohio Petroleum Co.* v. *Federal Power Commission,* 298 F. 2d 465 (10th Cir. 1961), the court stated at page 467:

> "The purpose of establishing an in-line price is of course the stability accorded producer, buyer, and the public in balance with the respective interests of each. Permanence is dependent upon the maintenance of such balance and the duty to guard, review, and, *if necessary, change the in-line price* rests with the Commission."

In its prior decisions, the District of Columbia Circuit has also recognized the time factor in determining the in-line price. In *Atlantic Refining Company* v. *Federal Power Commission,*[22] the Court stated:

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[21] Petitions for certiorari pending in Nos. 504, 520, 526, and 628 this Term.

[22] 316 F.2d 677 (D.C. Cir. 1963).

> "As used in *CATCO*, the line means the price at which similar sales, not suspect, were made under similar circumstances from the same area *about the same time.*"[23]

Distributors ignore the fact that the Commission's consideration of contemporary conditions and contemporary sales has in some instances resulted in a lower price line being established than would have been the case if reliance had been placed upon past periods. Thus the Commission found with respect to the 15¢ price line originally established for Texas District No. 4:

> "This line should be determined as of the time the contracts were made,[13] so that we should properly put greater emphasis on the calendar years 1958, 1959, and 1960." (Footnote omitted) *Skelly Oil Co., et al.*, Docket Nos. G-18638, *et al.*, 28 FPC 401 at 408 (1962).

The Commission's rejection of higher price levels prevailing in *prior* years was specifically approved on appeal by the District of Columbia Circuit:

> "The producer-petitioners make special objection to the Commission's refusal to rely upon a number of sales at 16 to 17 cents made in 1955 and 1956 to the Coastal Transmission Corp. *Since the Coastal sales were made before the 1958 to 1960 period when the contracts in the present cases were entered* into and since the majority of the subsequent sales in Texas Railroad District No. 4 were at less than 15 cents, *the Commission could reasonably determine as it did that the Coastal sales did not establish a valid line of 16 to 17 cents for that area during the 1958 to 1960 period." Public Service Commission of New York* v. *FPC*, 329 F. 2d 242, 246, 1964)

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[23] *Id.*, at page 680. In this case the District of Columbia Circuit affirmed the Commission's decision that the price line in North Louisiana had changed over a 17-month period from 16.5 cents to 17.0 cents, as of May 1, 1959, based upon consideration of contract prices and temporarily-certificated prices.

In other in-line proceedings, the Commission has been equally careful to base its price line upon evidence relating to the period contemporaneous with the contracts at issue. In Opinion No. 351, *Continental Oil Co.*, 27 FPC 96 at 100 (1962), the Commission determined the in-line price pursuant to this Court's directives in *CATCO* and stated that:

> "... we think that the question of 'in-lineness' should be determined as of 1956. It was then that the parties agreed on a price."

In Opinion No. 412, *Hassie Hunt Trust (Operator), et al.*, 30 FPC 1438 at 1442 (1963), the Commission held:

> "It is important to recognize that the key element in our in-line determination is the time at which the contract in issue was executed. *We cannot assume that the evidence upon which we govern an in-line determination for contracts in the late 1950's can automatically be applied to contracts executed in the 1960's.* On the contrary it would seem clear that the evidence must relate to a period reasonably contemporaneous with the contracts in issue."

Distributors' challenge to all initial prices proposed at levels higher than the Commission's original 15¢ in-line determinations for the late 1950's disregards the requirement that a proper price line determination must be based upon the current conditions prevailing in the area at the time the contracts in question were executed. Consonant with Distributors' approach, the Examiner based his recommended price line solely upon permanently certificated prices which represented only 1.39% of the volumes for all sales shown (I R. 5784). Such an approach is patently in conflict with the standard approved by this Court in *Callery*[24] where the "in-line" price was held to be the level

[24] *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223, 227 (1965).

at which "*substantial* amounts of gas have been certificated to enter the market . . . "

No evidentiary nor legal support exists for Distributors' position that the Commission must, as a matter of law, mechanically freeze its in-line levels for the 1950's regardless of whether the circumstances which led to the adoption of such initial price levels continue to exist. When dealing with a growing and viable industry, the Commission must be permitted, if not affirmatively *required* to consider changes in industry conditions. Otherwise, it cannot act in conformity with the present or future public convenience and necessity standard of the Act.

B. The Commission's 16 Cent In-Line Price Is Supported By Substantial Evidence

In reaching its 16¢ per Mcf in-line price determination, the Commission considered three catagories of evidence: (1) price levels under contemporaneously issued permanent certificates, (2) price trends under contemporaneously issued temporary certificates and (3) the applicable *Policy Statement* price level. This evidence evaluated by the Commission in light of an informed judgment and expertise developed in the handling of thousands of producer certificate applications was then the basis for the Commission's findings (I R. 5789). Distributors challenge these findings as being not supported by substantial evidence. However, the legal presumption in favor of such administrative findings is well established. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966); *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, 385 U.S. 57 (1966).

1. *Permanent Certificates* — The Commission turned first to the initial prices approved in permanent certificates

covering contracts executed during the relevant pricing period. All parties agree that this was relevant evidence. The Distributors say that it is the *only* evidence which the Commission can consider. The Commission disagreed, recognizing that such an approach due to the intervention and protest policies of Distributors would completely foreclose evaluation of current conditions in the industry and result in the price line being determined ". . . not upon consideration of a hearing record, but by the unreviewable fiat of the interveners" (I R. 5783).

An examination of the workings of Distributors' "suspect price doctrine"[25] on a chronological, step-by-step basis quickly discloses that their position automatically results in a freezing of the price line at whatever level they select.

Step 1. Distributors decide that the in-line price for a certain area is to be 15¢ per Mcf.

Step 2. When any producer in that area applies for a permanent certificate, if the initial contract price is higher than 15¢ per Mcf, the Distributor intervenes and protests.

Step 3. As a result of their unilateral action, Distributors then contend that the proposed price is "suspect" and therefore ineligible for consideration in making an in-line determination.

Step 4. Distributors continue to intervene in all producer applications in which the initial contract price is higher than 15¢ per Mcf. This effectively blocks the Commission from granting any permanent certificates at initial prices higher than Distributors' predetermined level.

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[25] This doctrine holds that it is an abuse of discretion for the Commission in establishing a price line to rely upon prices other than those "which have previously received permanent certification following hearing and which are not suspect because they are under judicial review or otherwise" (Pet. in No. 62, p. 12).

If the only relevant evidence on which the Commission can base its in-line price determination is confined to permanent certificates which Distributors have not challenged, then the only purpose of the Section 7 hearing is for the Commission to "find" what has been inevitable from the start, *i.e.*, the only "non-suspect" permanent certificates issued during the relevant time period are at the Distributors' pre-determined price level of 15¢ per Mcf or below. The approval of such a procedure would render the hearing required by Section 7 of the Act meaningless. It would completely foreclose the Commission from making adjustments to reflect current conditions in the industry. Moreover, it would deprive the Commission, as in this case, from basing its pricing determination upon substantial volumes of gas moving in interstate commerce.

Although advised by the Commission's order instituting these proceedings that the basic issue was whether the initial price should be 15¢, 16¢, or 18¢ (I R. 4638), Distributors failed to introduce any evidence in rebuttal to the presentations made by the producer applicants and the Commission Staff. The 15¢ "non-suspect" prices upon which Distributors rely were found by the Commission to be ". . . isolated and inherently nonrepresentative . . ." (I R. 5784). The Commission also found that:

> ". . . unlike any previous 'in-line' determination rendered by this Commission, the record before us contains neither substantial numbers of relevant permanently certificated contracts or evidence of substantial volumes of gas moving under permanent certificates" (I R. 5782-5783).

This finding is unchallenged. Clearly consideration of other types of evidence was required to determine if current conditions dictated a revision in the Commission previously approved price line.

2. *Temporary Certificates* — In addition to the isolated and non-representative permanent certificates, the Commission also considered initial prices approved during the relevant time period under temporary certificates. In determining to give consideration to temporary certificates, the Commission expressly rejected Distributors' contention that sales under temporary certificates fell within the "suspect price" doctrine (I R. 5783). Distributors object to the Commission's consideration of temporary certificate price levels and characterize such levels as reflecting merely ". . . current, essentially unregulated market levels . . ." (Pet. for Cert., No. 62, p. 12). By use of such labels, Distributors seek to intimate that the Commission exercised no discretion in the issuance of temporary certificates with respect to the price authorized or the other conditions contained therein. They further allege that such certificates were issued *ex parte* and under undefined procedures which provided Distributors no notice or opportunity to contest. These characterizations are totally false.

Each temporary certificate is issued only after Commission review pursuant to well-established policies regarding *inter alia,* (1) initial price levels, (2) rate increase moratorium, and (3) refunds. Specific conditions with respect to the above items are frequently imposed.[26] Where the price proposed by the producer for a temporary authorization gas sale was in excess of the initial price level set forth in its *Policy Statement* as currently revised, the Commission imposed a price condition down to the applicable price level.

Additionally, the provisions of Section 157.28 of the Regulations Under the Natural Gas Act clearly defined the procedures under which these temporary certificates were

[26] The mature consideration given by the Commission to applications for temporary certificates is discussed in greater detail at pp. 38-43, *infra.*

issued. Each of the Producers in the instant case fully complied with these procedures by filing with the Commission the appropriate certificate application and rate schedule intended to be effective for the sale. All of these filings were available to the Distributors for examination in the Commision's Public Reference Room. Similarly, the temporary certificate issued by the Commission with respect to the Producers' initiation of such sale was also placed on file by the Commission in its Public Reference Room (I R. 5305);[27] hence, there was no secrecy involved in the temporary authorization of these sales. The Distributors, then, as now, had ample notice of, and opportunity to object to, these sales prior to their commencement Moreover, since the courts have uniformly held that temporary certificates issued by the Commission are reviewable orders, any party opposed to the commencement of such sale had open to him an adequate avenue of protest.[28] Price levels approved under temporary certificates in accordance with clearly defined and well-established policies providing for notice to interested parties of an opportunity for judicial review cannot be fairly classified as "essentially unregulated."

Distributors also imply that the Commission deviated from its past practices in giving consideration to temporary certificates. This is erroneous. In its *Skelly* decision, the Commission gave a "limited degree of consideration" to the temporary certificates issued during the relevant time

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[27] Counsel have been informed that, since early 1960, copies of all temporary certificates have been placed in a special book in the Commission's Public Reference Room for easy access by interested members of the public. This is supplementary to the Commission's Rules of Practice and Procedure providing for public access to all filings and Commission orders relating to such filings. See 18 CFR 1.36(c).

[28] *Pure Oil Co.* v. *Federal Power Commission*, 292 F.2d 350 (7th Cir. 1961); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F.2d 404 (10th Cir. 1959).

period (28 FPC at 1068). In the *Skelly* appeal the District of Columbia Circuit noted with approval that the Commission "gave less consideration to prices allowed under temporary certificates than under permanent certificates. . . " (329 F. 2d at 245-246). See also *Texaco Seaboard Inc.*, 29 FPC 593 at 598; *The Ohio Oil Company*, 27 FPC 551 at 553; *Union Texas Petroleum*, 32 FPC 254 at 262. It should also be noted that, unlike *any* of the temporary certificates issued and considered by the Commission (with the court's approval) in the *Skelly* case, *all* the temporaries reviewed by the Commission in the instant proceeding were issued subsequent to the Commission's issuance of its *Statement of General Policy* and in accordance with the specific guidelines and standards set forth therein.

In the instant case, the Commission gave limited weight to the price levels under contemporaneously issued temporary certificates. An in-line price of only 16¢ per Mcf was established when the weighted average contract price for all sales under permanent and temporary certificates issued during the relevant time period was 17.2¢ per Mcf (I R. 5787). In determining to give some consideration to prices under temporary certificates, however, the Commission found:

> "*Refusal to consider the temporarily authorized prices,* in the circumstances of this proceeding, and reliance only on the few permanently certificated prices *can only result in a complete stagnation of prices at the 'in-line' level* initially determined for this District, a level *based on prices being paid for gas under contracts drawn up long before these contracts were executed*" (I R. 5787).

3. *Policy Statement* — Distributors also object to the Commission's consideration of the price levels established in its *Statement of General Policy* and the *Fifth Amendment* thereto. These levels reflect the Commission's expertise

acquired after working with producer matters for many years, are periodically revised, and based upon careful consideration of voluminous factual data:

> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas" (24 FPC at 819).

The Commission's *Policy Statement* price levels have provided an effective regulatory tool during the interim period prior to the establishment of just and reasonable rates. Its implications were thoroughly explored and approved by the Court of Appeals for the District of Columbia Circuit in *State of Wisconsin, et al.* v. *Federal Power Commission,* 303 F. 2d 380 at 387 (1961), *aff'd* 373 U.S. 294 (1963). Giving some measure of weight to the *Policy Statement* price levels in an in-line proceeding also has been approved by the District of Columbia Circuit in *PSC of New York* v. *Federal Power Commission,* 329 F. 2d 242, 247 (1964), where the court held, "The Commission could not have ignored altogether its own Policy Statement. . . ." The Third Circuit similarly held in *J. M. Huber Corp.* v. *FPC,* 294 F. 2d 568, 570 (3rd Cir. 1961).

The record establishes that *Policy Statement* guideline levels affected industry contracting practices during the relevent pricing period. In reliance upon such levels, many Producers decided to forego intrastate sales opportunities.[28a] Others voluntarily accepted lower contract prices in order

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[28a] For example, the evidence shows that Lamar Hunt in reliance upon the 18¢ *Policy Statement* price accepted a proffered unconditioned temporary certificate authorizing a 16.5¢ interstate sale in lieu of a comparable intrastate sale (I R. 483-85).

to avoid the cost and uncertainty of extended contested litigation (I R. 416, 428, 442-44). In determining to give some measure of weight to its *Policy Statement* price levels, however, the Commission also recognized that such unilaterally determined prices could not deprive any party of substantive rights and were at all times subject to challenge in a contested hearing. This is reflected by the Commission's establishment of a 16¢ in-line price for a time period in which the applicable *Policy Statement* guideline ceiling was 18¢. Distributors were given a full and fair opportunity to present evidence challenging the *Policy Statement* price levels, but failed to do so. Accordingly, there is no record support for the Distributors' position that the Commission abused its discretion in giving consideration to its *Policy Statement*.

4. *Additional Economic Evidence Proffered by Producers* — Part of the record evidence tendered for the Commission's consideration was certain geological, supply-demand, economic and financial requirements testimony (less than 400 pages in length, including exhibits) which Producers proffered in support of their proposed initial prices. This evidence was stricken in its entirety by the Presiding Examiner.[28b] The Commission upheld the action of the Presiding Examiner in this respect and the court below affirmed the Commission noting, however, that:

> "We do not say that economic and geologic evidence is never admissible in a §7 proceeding. This may depend on varying circumstances. All we say is that in the posture of this case the Commission did not abuse its discretion by rejecting the evidence[14]" (Footnote omitted, I R. 6710).

The Commission's opinion makes clear that the exclusion of this evidence was premised on the assumption that the record contained sufficient *other* evidence, including tempo-

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[28b] This evidence is summarized in Appendix B.

rary certificate and *Policy Statement* price levels, to determine a revised initial price line in light of current conditions in the industry. Thus, the Commission states:

> "We note, however, that *the refusal to permit the producers to attempt to show cost and other economic justification* for a higher price line over that prevailing in an earlier period, administratively essential if we are to achieve 'in-line' determinations prior to the resolution of area rate proceedings, *makes it encumbent on the Commission to give special consideration to the field price evidence as to shifts in the pricing line*" (I R. 5781).

Unless the Commission is permitted to consider evidence in addition to "non-suspect" contemporaneous permanent certificates, it will be placed in a strait jacket by the distributors' intervention and protest policies. If the additional evidence relied upon by the Commission to justify a revision in its price line to reflect changed circumstances is incompetent, the only alternative is a reopening of the record to receive the general economic evidence tendered by the producer applicants.[29]

C. The Evidence Adequately Supports The Commission's Findings

The Commission established a 16¢ per Mcf in-line price which was ". . . the *lowest* price at which substantial volumes of new gas were sold in interstate commerce in the

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[29] In this connection, several Producers have filed a conditional cross-petition currently pending as No. 82, this Term. In the event that this Court should determine that the evidence considered by the Commission was improperly used to determine the price line, the granting of this pending conditional cross-petition would enable the Court to consider, this Term, the full spectrum of the potential evidentiary record available to the Commission in reaching its decision below without the necessity of a separate remand.

area during the period in question . . ." (I R. 5789).[30] While we believe the evidence would have supported an initial price higher than 16¢ per Mcf,[31] the Commission's action shows that substantial weight was given to the Distributors' arguments in support of lower price levels, even to the extent of deviating from its past methodology approved by this Court in *Callery*.

The Commission's in-line technique was defined in its Brief to this Court in *Callery* at page 31 as follows:

> "The evidence was uncontradicted, the specific finding undisputed, and the only question is whether the Commission acted improperly in fixing the in-line price at the *highest level* remaining after eliminating from its consideration the unsupported CATCO prices and similar prices obviously influenced by the Commission's earlier erroneous certification of the CATCO contracts.
>
> "We submit that the Commission's action is supported, if not indeed required, by prior decisions of this Court."

Insofar as any method of determining an in-line price has been sanctioned by the Court, this was the method. This method is also reflected in the following statement in the majority opinion:

> "We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices *higher than existing levels*" (382 U.S. at 227).

The findings made by the Commission from the evidence clearly demonstrates that the 16¢ per Mcf level it estab-

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[30] In its initial in-line determination following the *CATCO* remand, the Commission found the proper price line to fall between the highest group of prices and the median price (27 FPC at 485).

[31] See dissenting option of Judge Seth (I R. 6745-6757).

lished was definitely not excessive but rather was the *"lowest* reasonable level" permitted by the evidence before it. The Commision specifically found that:

(1) The weighted average contract price for the relevant sales was in excess of 17.176¢ per Mcf (I R. 5786).

(2) Seventy-one percent of relevant volumes was sold at initial rates of 17¢ and above (I R. [redacted] 5786).

(3) ". . . [T]he sales at prices of 16 cents per Mcf and above account for fully 82 percent of the gas presently moving in interstate commerce under contracts executed in the time period here under consideration" (I R. 5786).

(4) ". . . there is evidence that points in the direction of a higher price" (I R. 5789).

(5) ". . . our decision herein draws the line substantially below the average going price for gas in the area" (I R. 5790).

(6) ". . . the 16-cent determination herein thus not only preserves, but actually rolls back, the initially considered price line for the period in issue" (I R. 5790).

(7) A price level of 18¢ would not have an adverse effect on the existing pricing structure in this area (I R. 5791).

In reaching its 16¢ per Mcf in-line price determination, the Commission exercised its "informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications" (I R. 5789). A balancing of the many conflicting policy considerations and principles applicable to the formulation of an in-line price consistent with current conditions in the industry must to a certain extent rest upon the Commission's expertise. This fact was cogently recognized by the Ninth Circuit Court of Appeals in *People of the State of California* v. *Federal*

Power Commission, 353 F. 2d 16 at 23 (1965), wherein the court stated:

> "We think, then, that in view of the many 'in-line pricing' cases that the Commission has decided, and of the attitude that it has shown in deciding them, we owe it the same deference to its expertise the courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."

Quoting with approval the above opinion of the Ninth Circuit, the lower court also recognized the important role of agency expertise under the circumstances presented in the instant case (I R. 6728). In a subsequent opinion the Tenth Circuit has also succinctly stated the guiding principles in an in-line proceeding, *Pan American Petroleum Corp., et al.* v. *FPC, et al.,* 376 F. 2d 161 at 168-169, petition for cert. pending in Nos. 227 *et al.*:

> "The general purpose of the Act is to protect the consumer, but section 7 proceedings, as well as other proceedings in the administration of the Act, must consider an attempt to obtain a balance between the interests of consumer, producer and all others whose interests fall between. *The task is difficult, but experience has gradually attached more than lip-service significance to administrative expertise.* Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices have made some adjustment in view of the inescapable captured market of regulation. The establishment of guidelines is a considered administrative function. Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interests. [Citations omitted] We consider each of these procedural and background incidents to have proper evidentiary significance in a section 7 proceeding to be weighed by the Commission against the impact of

Under The Natural Gas Act,[33] Producers requested authorizations to commence deliveries under temporary certificates. The Commission authorized these individual dedications of natural gas to interstate commerce and simultaneously accepted the respective sales contracts as the rate schedules governing these sales. Price conditions were imposed, where appropriate, to insure that the initial prices did not exceed the applicable *Policy Statement* price level.

Eight of the temporary certificates required the Producer to accept as a condition to its grant, the possibility of later refunds. The typical refund condition in those certificates provided that, if the permanently certificated price for the sale were less than the price collected under the temporary certificate, refunds would be required measured by the permanently certificated price or by an express refund floor whichever was higher. However, the refund question presented by this litigation does not concern these eight refund-conditioned temporary certificates.[34]

The refund issue here does concern the temporary certificates issued by the Commission which did not contain any forewarning whatsoever that the price authorized by the Commission would be subject to possible refunds upon permanent certification.[35] It is the Commission's retroactive imposition of refund liabilities upon those sales made

[33] 18 C.F.R. §157.28(c).

[34] In its Opinion No. 422, the Commission required refunds by those Producers who had accepted a temporary certificate with a refund condition and had sold their gas at a price in excess of the Commission's later "in line" price determination of 16 cents per Mcf (I R. 5791). The lawfulness of this requirement is not questioned here.

[35] In its Opinion No. 422, the Commission described these unconditioned temporary certificates as follows:

> "The temporary authorizations issued in the remaining dockets do not provide for refunds in the event the initial public convenience and necessity price is found to be lower than the prices permitted under the authorizations * * *" (I R. 5791).

producing industry requires that the terms and conditions of Commission authorization be known, and thereafter honored, when gas reserves are irrevocably committed to interstate commerce. Otherwise, the substantial expenditures and investments required to bring forth such reserves cannot reasonably be made. In obvious recognition of the need to assure producers that the terms and conditions of certificate authorizations issued in implemention of the *Policy Statement* could be relied upon, the Commission concluded:

> "* * * the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation * * *" (24 FPC at 819).

For Texas District No. 4, the *Policy Statement* established an initial price level of 18.0 cents per Mcf for new sales under contracts executed after September 28, 1960 (24 FPC at 820). The contracts accepted by the Commission as rate schedules governing the sales in question were executed after the promulgation of the Commission's *Policy Statement*. It is undisputed that many of the Producers were guided by the *Policy Statement* in deciding to commit their gas reserves to interstate commerce.[38] Moreover, the temporary certificates authorizing these sales without refund condition were issued while the *Policy Statement*

[38] Evidence presented by the Producer applicants at the hearing below concerning permanent certification demonstrates that the Producer sellers were well aware of the *Policy Statement* price as a practical limitation upon their contract negotiations with the pipelines. This evidence also demonstrates that the Producers relied upon the 18¢ *Policy Statement* level as a guide in their contract negotiations (*e.g.*, I R. 415-16, 427-29, 442-43, 1042-44).

price of 18 cents was in effect. There is no question that the Commission itself consciously adhered to its *Policy Statement* in granting these temporary certificates. Moreover, the record shows that Producers relied heavily upon the temporary certificates as issued by giving up specific intrastate markets for their gas.[39]

After the Commission issued these temporary certificate orders, Distributors requested that the Commission either set aside those orders or modify them by the imposition of refund conditions. "This we will not do" held the Commission by its order of February 5, 1963 (I R. 5307; 29 FPC 218, 220).[40] In that order, the Commission held that it had issued the questioned temporary certificates and authorized the collection of prices "without condition as to refund", and that those rates were the lawful rates to be collected "until a prospective price could be determined." It also found that since Producers had commenced deliveries in "justifiable reliance" upon those certificates, as issued, the imposition of the refund conditions sought by Distributors would place the Commission in the "position of having induced producers to dedicate their gas to the market upon

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[39] For example, one of the Producer witnesses testified that the sales contract of his company specifically provided for the sale of the gas involved in intrastate commerce if the Commission required a reduction of the 16.5 cent initial price (I R. 483-85). However, the Commission issued a temporary certificate without price condition.

[40] Producers do not concede that the Commission possessed the power to unsettle the temporary certificates previously issued by imposing upon them a new and onerous prospective condition at that time. Nevertheless, the reasons given by the Commission in denying Distributors' motion demonstrate that its refusal to impose refunds upon the temporary certificates was founded upon a mature consideration made in the light of the circumstances of this case and the purpose of its *Policy Statement* (I R. 5305-07).

one set of conditions, and then imposing more stringent conditions upon them" (I R. 5305-5307).

However, quite independently of the foregoing reasons, the Commission also justified its unconditioned temporary certificate orders by reference to its *Policy Statement*, stating:

> "• • • in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate" (I R. 5307).

It further stated that its *Policy Statement* ceiling prices represented its judgment of the price levels which would enable it

> "• • • to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas" (I R. 5307).

The reasoning of this order was not merely an *ad hoc* determination, but indeed represented the Commission's consistent application of a well-considered policy in the granting of temporary certificates, *Federal Power Commission* v. *H. L. Hunt, et al.*, 376 U.S. 515 (1964); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 313 (1963);

American Liberty Oil Company v. *Federal Power Commission,* 301, F. 2d 15, 18-19 (5th Cir. 1962); *Area Rate Proceeding, et al.,* Docket Nos. AR61-2, *et al.,* 29 FPC 223 (1963).

It is thus clear that the Commission's orders granting these temporary certificates, subject only to prospective modification upon permanent certification, was a conscious and advertent application of its own formal policies, see *American Trucking Associations* v. *Frisco Transportation Company,* 358 U.S. 133, 146 (1958); *The Upjohn Company* v. *Pennsylvania Railroad Company,* 381 F.2d 4 (6th Cir. 1967).[41]

B. The Imposition Of Refund Liabilities Upon Sales Made In Reliance Upon Valid Temporary Certificate Orders Which Did Not Contain Refund Conditions Is Unlawful

The Commission's authority to attach conditions to the issuance of certificates of public convenience and necessity is found in Section 7(e), 15 U.S.C. §717f(e), which provides, in pertinent part, that:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require * * *"

It is well settled that in appropriate circumstances the Commission can, in light of this statutory provision, pro-

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[41] The Court of Appeals for the Second Circuit (opinion by Friendly, J.) has held that an administrative "decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles" and that "the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established," *N.L.R.B.* v. *Majestic Weaving Co.,* 355 F.2d 854, 860 (2d Cir. 1966).

more probative evidence such as permanent certificates in its determination of in-line prices."

The result reached by the Commission was fully supported by the record and consumer protection objectives of the Natural Gas Act.

II. THE COMMISSION ERRED BY IMPOSING REFUND LIABILITIES RETROACTIVELY UPON PRODUCERS' SALES MADE PURSUANT TO AND IN RELIANCE UPON VALID TEMPORARY CERTIFICATE ORDERS WHICH MADE NO PROVISION FOR REFUNDS[31a]

The refund question raised by the petitions in Nos. 60-62, 80 and 97, concerns the rights conferred upon Producers by the temporary certificates of public convenience and necessity granted to them by the Commission pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c).[32] Essentially, the Commission and Distributors contend that a temporary certificate order merely authorizes the sale of natural gas proposed by the applicant, but does not establish the terms and conditions of that sale during the period of temporary certification. The court below has held, however, that the temporary certificates at issue here authorized the collection of firm, nonrefundable prices and concluded, therefore, that the Commission lacked the power to impose refund liabilities retroactively upon these consummated sales under the guise of a refund condition attached to the permanent certificates.

On the basis of individual applications filed in accordance with Section 157.28(c) of the Commission's Regulations

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[31a] This section of the brief is only applicable to those Respondents who were issued such temporary certificates.

[32] Section 7(c) provides, in pertinent part:

> "* * * That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *" [52 Stat. 824, as amended, 56 Stat. 83, 15 U.S.C. 717f(c)].

under unconditioned temporary certificates which creates the refund question in this case. It is, therefore, critical to a proper resolution of this issue that consideration be given to the circumstances in which the temporary certificates governing those sales were issued and accepted authorizing the collection of proposed initial prices if no higher than the applicable *Policy Statement* price established by the Commission.

A. The Temporary Certificates Which The Commission Issued Were Individually And Maturely Considered And Were, In Fact, Implementations Of Its *Statement of General Policy No. 61-1*

The Court in 1959 in *CATCO*[36] admonished the Commission to give careful scrutiny to the initial price proposals of producers under Section 7 of the Natural Gas Act. The Court there suggested that if initial price proposals were not in the public interest, the Commission should impose appropriate conditions at the time of initial certification. Following *CATCO*, the Commission implemented the Court's directive by attaching various conditions to the certificate authorizations granted to producers. In the area of temporary certification, this policy was carried out by requiring a reduction in the initial price proposed or by imposing refund conditions.[37] In some cases, the Commission imposed both of these conditions in its temporary certificate orders in light of the circumstances of the particular initial price proposal before it. Whatever the condition imposed, it was based upon the Commission's recognition of the ne-

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[36] *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378, 391 (1959).

[37] The Commission also used its conditioning power at the time of temporary certification to prohibit the filing of price increases in excess of the applicable *Policy Statement* level. The Court upheld a condition of this type in *Federal Power Commission* v. *H. L. Hunt*, 376 U.S. 515 (1964).

cessity to protect all segments of the public interest during the period of temporary certification.

Confronted with the responsibility of apprising the natural gas industry of its regulatory standards for producers, the Commission in 1960 issued its *Statement of General Policy No. 61-1* which established rate standards in various well-known producing areas of the United States (24 FPC 818). These standards included an initial price level for the particular area which was to govern the Commission in passing upon initial prices under new contracts executed after the *Policy Statement*. The Commission there stated:

> "* * * By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended" (24 FPC 818).

It further stated that the acceptable initial rates for certification, as contained in the *Policy Statement*, were expressly based upon all of the relevant facts acquired by it as the result of six arduous years of producer regulation (24 FPC at 819).

The intent of the *Policy Statement* is unequivocally clear. It was designed to bring certainty to the area of producer regulation in a manner fair to all segments of the natural gas industry. It made clear that the Commission would not authorize new sales by producers unless their initial price proposals conformed to the applicable *Policy Statement* level. At the same time, it gave recognition to basic economic reality, *i.e.*, that the financial stability of the

spectively reduce an initial contract price as a condition to permanent certification, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959), *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961). The Commission is similarly empowered to attach appropriate conditions to its grant of temporary certificates, *Federal Power Commission* v. *H. L. Hunt, et al.*, 376 U.S. 515 (1964); *American Liberty Oil Company* v. *Federal Power Commission*, 301 F. 2d 15 (5th Cir. 1962); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959).

However, the Commission's power to attach conditions to its certificate orders is not unlimited. In *Sunray Mid-Continent Oil Company* v. *Federal Power Commission, supra*, the Commission issued a temporary certificate which would have required the producer applicant to dedicate and sell his natural gas subject to indefinite refund liabilities, the extent of which was contingent upon the permanently certificated price. The reviewing court viewed this refund condition as requiring the producer "to speculate as to what the ultimate temporary rate may be" while dedicating his gas to public service (270 F. 2d at 409). Consequently, the court held that such a condition, purporting to hold in abeyance future conditions of unknown extent, was improper because it deprived the certificate holder of his right to know the conditions under which he was dedicating his gas to interstate commerce.

Until the issuance of its permanent certificate order in this case, the Commission had made clear that it relied upon the *Sunray Mid-Continent* decision as establishing the proper limits of its conditioning power. This was reaffirmed by the Commission's order of February 5, 1963 herein, when it refused to impose indefinite refund conditions upon the temporary certificates which it had previously issued to

Producers. In that same order, the Commission also observed that its refusal to impose refund conditions upon these certificates authorizing prices at or below its *Policy Statement* price created a salutary stability for all concerned since the firm price which it had authorized effected a proper balance between the interests of producers and consumers alike.

To assure the maintenance of prices temporarily certificated in keeping with the applicable *Policy Statement* level, the Commission has also found it advisable to impose certificate conditions which preclude the filing of contractually-authorized price increases above the *Policy Statement* level during the period of initial certification. The Commission has justified a condition of this type as necessary to the maintenance of a price which it has found to be consonant with the interests of producers and consumers alike. The propriety of just such a condition in a temporary certificate order has been upheld by the Court in its recent decision in *Federal Power Commission* v. *H. L. Hunt, supra.* The Court there recognized that the Commission possesses a broad power to condition temporary certificates at their issuance. At the same time, however, the clear implication in *Hunt* is that the conditioning power should be properly exercised in a manner fair to all concerned, including the certificate holder. Thus, the Court held that:

> "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the ex parte nature of the proceeding, *it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued*" 376 U.S. at 523).

In the case-at-bar, the authorized initial prices ranged from 16 and 18 cents per Mcf. In the one instance where a Producer proposed a price in excess of the *Policy Statement* rate, the Commission fixed by condition the temporary certificate rate at the 18-cent level (1 R. 4346-47). In granting the remaining temporary certificates, however, the Commission determined that it was not necessary to exercise its price conditioning power since the proposed prices were either less than or in conformity with the *Policy Statement*.[42] Contrary to the holding in *Hunt*, however, the Commission is here asking to be endowed with a power designed to modify retroactively the terms upon which it authorized sales of natural gas in interstate commerce. Thus it contends that, despite its plenary power to condition temporary certificates at issuance, it should also be authorized to exercise this plenary power with retroactive effect at a point in time long after the certificate holders have dedicated their gas to the interstate market in reliance upon the temporary certificates as issued in compliance with the Commission's regulations and its established policy.

Finally, the unreasonableness of a retroactively-imposed condition nullifying the terms and conditions of the Commission's temporary certificate orders in this case is high-

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[42] In *American Liberty Oil Company* v. *Federal Power Commission*, *supra*, the Commission's attachment of a price condition to a temporary certificate reducing the proposed price to the applicable *Policy Statement* level was judicially affirmed. In defending the reasonableness of such condition, the Commission pointed out to the reviewing court that it was thereby fulfilling its obligation to give a most careful scrutiny and responsible reaction to initial price proposals of producers under Section 7 of the Natural Gas Act, citing *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 391 (1959) [Brief of Federal Power Commission (p. 3), dated July 10, 1961, in *American Liberty Oil Company* v. *Federal Power Commission*, No. 18,827 (5th Cir.)].

lighted by the Commission's order of February 5, 1963. That order confirmed Producers' rights to a firm, nonrefundable price until modified prospectively upon permanent certification. To modify retroactively valid temporary certificate orders would, in the Commission's own words, "so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (I R. 5307; 29 FPC at 220).[43] In view of the foregoing, the Court should hold that in these circumstances the Commission lacks the power to modify retroactively valid temporary cerificate orders.

C. Attempts To Read Refund Conditions, Express Or Implied Into The Temporary Certificates Are Contrary To Fact And Erroneous As A Matter of Law

The Commission and Distributors erroneously attempt to read a refund liability into the temporary certificates which were issued. First, they argue that certain language contained in the temporary certificates constitutes a condition which placed Producers on notice that refunds might ultimately be ordered. Second, they argue that the Commission possesses an inherent power to modify retroactively

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[43] See FPC Chairman Swidler's address to the 1961 Annual Meeting of the American Petroleum Institute. In explanation of the effect of the Commission's policy in granting temporary certificates authorizing producer sales at initial prices at or below the *Policy Statement* price levels, he stated:

> "* * * It is our policy to authorize initial sales on a firm basis at these prices, confident that they will be in the public interest and that refund conditions are not required * * *. Producers now know that all of the new initial price is theirs to keep * * *."

Recognizing this as one of many Commission assurances upon which producers relied in these circumstances, the court cited Chairman Swidler's address in *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F.2d 161, 171 (10th Cir. 1967).

the terms of these temporary certificate orders. Both of these contentions are patently wrong.

(1) The temporary certificates contained no language which can reasonably be construed as a forewarning of possible refunds

Each of the temporary certificate orders which the Commission issued in this case, even those which included an express refund condition,[44] contained essentially the following language:

> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act" (I R. 4147).

Indeed, every temporary certificate ever issued to an independent producer by the Commission has contained the foregoing boiler-plate language, or words to similar effect.

Before the court below, Commission counsel argued, in total disregard of the Commission's prior actions in this case and elsewhere, that the foregoing language was "more than adequate * * * to forewarn them [*i.e.*, Producers] of the possibility that refunds of excessive amounts collected

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[44] Typical of such refund condition is the following provision: "(1) The initial price for such service shall be 16 cents per Mcf at 14.65 psai, subject to Sun Oil Company refunding to South Texas Natural Gas Gathering Company from the date of first delivery any amounts collected plus interest at 7 percent per annum, in excess of 15.0 cents per Mcf which may be determined to be in excess of the price required by the public convenience and necessity in Docket No. CI62-276" (I R. 5312).

under the temporaries might ultimately be required by the Commission's final order."[45] This interpretation is wholly at odds with the meaning heretofore attributed to this language by the Commission itself.

At the hearing below, Distributors contended that the above-quoted language constituted an indefinite refund condition (I R. 66-67, 76). The Commission, however, made unmistakably clear, by its order of February 5, 1963 herein, that the foregoing language does not amount to a refund condition or a forewarning to the certificate holder that refunds my be imposed. Thus, despite the "without prejudice" language in each of the temporary certificates, the Commission held that they had been

> "• • • granted *without condition as to refund to a price below that at which the sale would be initiated.* The initial price would, however, continue to be collected until a *prospective* price could be determined after hearing upon the applications. Sales of gas were commenced by each of the producers pursuant to and in reliance upon the temporary authority" (I R. 5305; 29 FPC at 219).

Moreover, eight temporary certificates did contain explicit refund conditions as well as the routine language, quoted above. It is only reasonable to conclude, as did the court below, that if the Commission had intended the "without prejudice" language as a refund condition, it would not have been necessary to include also a specific refund condition in those temporary certificates.[46]

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[45] Brief of the Commission (p 27), dated March 14, 1966, in *Sunray DX Oil Company, et al.* v. *Federal Power Commission* (Nos. 7781, *et al.*, 10th Cir.).

[46] The court below took specific note of the temporary certificate issued to Sun Oil Company in FPC Docket No. CI62-276 (I R. 5312-13). This certificate order contained a refund condition as well as the "without prejudice" language. As to it, the court below correctly observed:

The Commission has also made clear elsewhere that it did not intend to impose refund liabilities upon sales made pursuant to temporary certificate orders containing this routine language.[47] As early as 1955, the Commission issued a permanent certificate to an independent producer authorizing a sale at 10 cents, after previously granting temporary certification of that sale at 12 cents. Although the temporary certificate order there contained the routine "without prejudice" language, quoted above, the Commission did not impose refund liabilities upon the collections made pursuant to the temporary certificate, *Cities Service Gas Company, et al.*, 14 FPC 134 (1955), *aff'd sub nom, Signal Oil and Gas Company* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956), *cert. den.*, 353 U.S. 293. Upon review, the Third Circuit noted that although the Commission could attach a prospective condition at the time of permanent certification, it could not retroactively reduce the rate collected under a temporary certificate containing the "without prejudice" language.

"* * * It contained a definite refund obligation covering collections at a rate above 15 cents per Mcf and the provision that: 'This temporary certificate and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require.' The inclusion of this routine language could not mean that the explicitly floored refund obligation became floorless." *Sunray DX Oil Company* v. *Federal Power Commission*, 370 F.2d 181, 194, fn. 48 (10th Cir. 1966) [I R. 6740].

[47] Notably in the record in the related consolidated cases (Nos. 111, 143), the Commission expressly made clear that no refund liability is implied when a producer dedicates his gas under an unconditioned temporary certificate which contains the standard "without prejudice" language (III R. 357-59). Thus, in granting a temporary certificate to Skelly Oil Company at an initial price level below the applicable *Policy Statement* level, the Commission stated:

"* * * In issuing temporary authorizations to these producers, we will permit them to render service under their rate schedules without any conditions relating to initial prices where such prices are at or lower than those price levels set forth in our Policy Statement 61-1, as amended * * *" [III R. 66; 26 FPC 677, 683 (1961)].

In a later producer certificate case, the Commission in 1963 expressly refused to treat the routine "without prejudice" language as a refund condition, when contained in a temporary certificate order, *Placid Oil Company, et al.*, 30 FPC 283, 293 fn. 24 (1963); on rehearing, 30 FPC 682, 685 (1963).[48] In denying Distributors' attempts to have a retroactive refund obligation imposed in the latter case, the Commission found:

> "* * * Our refusal to order the refund was based upon the fact that the temporary authorization which had been granted Superior on October 22, 1958, did not contain a refund condition. Thus, although Superior [*i.e.*, the certificate holder] was informed that once service was commenced under the temporary authorization it could not be discontinued without permission of the Commission, there was nothing to alert it to the possibility that a refund might be required thereunder. For this reason we believe it would be inequitable to now require Superior to make the refund * * *" (30 FPC at 685).

It is also significant that virtually identical "without prejudice" language is employed by the Commission in its orders granting permanent certificates, in its orders approving rate settlements,[49] and in its orders accepting rate

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[48] In that case, the Commission's power to compel refunds of amounts collected under judicially invalidated permanent certificates was upheld by the Court in *United Gas Improvement Co., et al.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). However, the Commission's order refusing to impose refunds upon this temporary certificate containing the "without prejudice" language was not challenged there.

[49] *E.g.*, *Humble Oil & Refining Company*, 32 FPC 49, 57 (1964); *Tidewater Oil Company*, 27 FPC 1267, 1271 (1962); *Gulf Oil Corporation*, 29 FPC 837, 841 (1963); *Sun Oil Company*, 32 FPC 894, 900 (1964); *Sunray DX Oil Company*, 33 FPC 129, 133 (1965). The only meaning which can be lawfully attributed to the "without prejudice" language in Commission orders approving rate settlements is that such approval does not bar prospective modification of the approved rates in appropriate circumstances.

increase filings without suspension where it is indisputable that the Commission cannot lawfully impose refund liabilities at a later time. In the case-at-bar, for example, the Commission's order granting permanent certificates was issued "without prejudice to any findings or order which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted * * *" (I R. 5796). Such language cannot and does not provide a basis for retroactive modification of valid permanent certificate orders, *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 433 (1947); see *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965).

Similarly, in accepting rate increases under Section 4 of the Act without suspension, the Commission's orders always provide:

> "This acceptance for filing does not constitute authorization under Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval of any rate or provisions contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."

This language is taken from the Commission's unreported order accepting Continental Oil Company's rate increase involved in the litigation leading to the Court's recent decision in *United Gas Pipe Line Company* v. *Federal Power Commission*, 385 U.S. 83 (1966). There, the Court noted that the pipeline purchaser, United Gas Pipe Line Company, had unsuccessfully sought rehearing of the Commission's order approving the rate increase but had not

sought judicial review of the Commission's order denying rehearing (385 U.S. at 85). Certainly, the Commission could not validly argue that the routine language contained in the order accepting Continental's rate increase would empower it at a later time to impose refund liabilities upon the monies collected under the increased rate accepted for filing. Yet, this is exactly what the Commission's present interpretation of the virtually identical language in its temporary certificate orders now suggests.

In light of the foregoing, it is readily apparent that the routine "without prejudice" language in the temporary certificate orders of the Commission, including those herein, was not intended by the Commission to constitute a refund condition or notice to the certificate holder that refund liabilities might ultimately be imposed. We respectfully submit that the Commission's present interpretation of this routine language is nothing more than a *post hoc* rationalization designed to justify a retroactive application of a change in Commission policy.

The true meaning of the above-quoted "without prejudice" language in its temporary certificate orders was correctly interpreted by the court below when it found as follows:

> "In our opinion these provisions mean that the Commission is not binding itself, by the issuance of a temporary certificate, to issue an identical permanent certificate of prospective effect after a hearing.[48] [Footnote omitted.] In its denial of the distributors' motion for refund conditions the Commission gave no recognition or effect to such provisions. We believe that the Commission intended the routine, boiler-plate language to have a purpose entirely different from that of an express refund condition" (I R. 6740-41; 370 F. 2d at 194).

The above interpretation by the court below of the "without prejudice" language in the temporary certificates at issue is not only correct on the basis of the record in this case, but is the only logical interpretation in light of the Commission's use of similar language in the other situations, noted above, where such language can only be given prospective effect as a matter of law.

(2) The Commission's regulations governing the issuance of temporary certificates do not provide for refund conditions in the absence of an express condition to that effect

The temporary certificates here involved were issued pursuant to Section 157.28 of the Commission's Regulations Under the Natural Gas Act. These Regulations have never contained any provisions forewarning a producer selling his gas under an unconditioned temporary certificate that he might later be required to refund monies collected under the filed rate schedule made effective by the temporary certificate. As the Tenth Circuit held in a 1959 decision:[50]

> "* * * Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by a bond'" (270 F. 2d 404, 409).

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[50] *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F.2d 404 (10th Cir. 1959).

Yet, according to the Commission's *present* argument, it is irrelevant that the Producers initiated their sales of gas under unconditioned temporary certificates issued under such regulations, which specifically indicated that the rate schedule on file would be the sole determinant of price. Nonetheless, the Commission *now* claims that the payments received for gas sold under these temporary certificates were provisional only and that the Commission can now require refunds.

The Commission's action in promulgating Section 157.28 of its Regulations Under the Natural Gas Act belies this contention. This regulation was issued only after public notice (21 F.R. 4833) and careful consideration of comments submitted by all segments of the natural gas industry (Order No. 193, 16 FPC 497). With particular reference to the problem here involved, the Commission noted:

> "Suggestion has been made that the requirement that there be on file an *effective* rate schedule covering the proposed service filed in accordance with Section 154.91 through 154.102 of the Regulations be deleted. We do not deem it advisable to eliminate this requirement, * * *
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> * * *
>
> "No sales or transportation subject to the Natural Gas Act may be made without rate schedules therefor being on file with the Commission. This requirement applies whether the sales or transportation are on a temporary emergency or permanent basis. * * * Acceptance of a rate schedule for temporary or emergency service is no assurance that it will be accepted by the Commission for permanent service, or that rate conditions may not be included in the certificate authorization" (16 FPC 497, 498).

Thus, by this language, the Commission made clear (1) that no sale under a temporary certificate could be made in

the absence of a filed rate schedule effective for the period of temporary certification, and (2) the Commission's acceptance of the rate schedule for temporary service would not bind the Commission to accept it for permanent service. Accordingly, when the temporary certificates in the case-at-bar were issued, the rate schedules designated and accepted for filing contained the unconditionally effective rate for the period of temporary certification. As a consequence, such rates could only be modified *prospectively* upon permanent certification. Plainly, therefore, any attempt to change the filed rate effective for such temporary service by means of a condition in the permanent certificate and the requirement of a refund in respect thereof, constitutes retroactive rate making and an effort unlawfully to extract reparations. See, *e.g., Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana Dakota-Utilities Co.* v. *Northwestern Public Service Co.*, 340 U.S. 246, 251 (1951).

(3) The Court's *Callery* decision does not authorize the retroactive modification of the temporary certificates

The Commission and Distributors also contend that the Commission can modify retroactively lawful temporary certificate orders which have not been set aside on judicial review. This contention is essentially based upon their misreading of the Court's decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965).

The *Callery* case involved the question of the Commission's power to redetermine *ab initio* the terms and conditions of producer sales made pursuant to permanent certificates which had never become final and had been later set aside. In that case the Court was faced with the contention that the Commission lacked the power to modify retroactively the prices collected pursuant to the judicially in-

validated certificates. In support of this contention, the certificate holders argued that the ordering of refunds in those circumstances constituted an award of reparations. The Court agreed that the Commission lacks the power to make reparation orders, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). The Court, however, held that the Commission is empowered to impose refund liabilities upon collections made pursuant to an invalidated certificate order since "an agency, like a court, can undo what is wrongfully done by virtue of its order" (382 U.S. at 229).

Unlike the situation in *Callery,* Producers here have made their sales pursuant to lawfully issued temporary certificate orders which have never been set aside. Until March 23, 1964, the Commission had never suggested in this case, or anywhere else for that matter, that the amounts collected in reliance upon those lawful orders were subject to possible refund liabilities. Indeed, the Commission affirmatively made clear just the contrary. The Commission recognized unequivocally, in its order of February 5, 1963, that the prices, authorized by its temporary certificate orders, were firm prices upon which the certificate holders could rely. With equal force, it denied Distributors' request that prospective refund conditions be imposed. From the point of view of Distributors, this order was a definitive order subject to review under Section 19(b) of the Natural Gas Act. However, the Distributors did nothing more.

It is well-established that the Commission's temporary certificate orders are judicially reviewable, *Federal Power Commission* v. *H. L. Hunt,* 376 U.S. 515 (1964); *Texaco Inc.* v. *Federal Power Commission,* 290 F. 2d 149, 156 (5th Cir. 1961). In *Pennsylvania Railroad Company* v. *United States,* 363 U.S. 202, 205 (1960), the Court held that an administrative order which "determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable." See

also: *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, 339 F. 2d 56, 63 (2d Cir. 1964), *cert. denied sub nom. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 382 U.S. 842; *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860, 863 (10th Cir. 1958), *cert. denied sub nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), *cert. denied sub nom. Japan-Atlantic & Gulf Conf.* v. *United States*, 347 U.S. 990. By its order of February 5, 1963, the Commission held that the prices being collected by Respondents under their temporary certificates were firm prices subject only to prospective modification at the time of permanent certification. Notwithstanding the definitive language of the February 5th order, the distribution company interests took no appeal from it, and the time for seeking review thereof under Section 19(b) of the Natural Gas Act has long since expired. As a consequence, this order became binding upon them and the Commission itself. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F. 2d 999, 1004 (D.C. Cir. 1963). In *Pan American*, the court observed that an administrative agency retains jurisdiction to reconsider and modify its order only until the time for judicial review has expired.

This case concerns not only a repudiation by the Commission of its own orders, which were binding upon all. It also concerns a repudiation by the Commission of its long-held position, as represented to the Court in *Federal Power Commission* v. *H. L. Hunt*, *supra*, that the *status quo* established by the grant of temporary certificates at prices conforming to the Commission's *Policy Statement* level should be maintained even if it be necessary to prohibit contractually-authorized price increases above that level during the period of temporary certification. If the Commission were permitted to nullify retroactively its own

orders, upon which Producers were led to rely by the Commission itself, it would be tantamount to saying that the official word of the Federal Government is little more than a snare and delusion, unworthy of reliance. Traditionally, courts have refused to give their sanction to such behavior by administrative agencies, *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46 (D. C. Cir. 1953); see *Safarik* v. *Udall*, 304 F. 2d 944, 949-50 (D.C. Cir. 1962), *cert denied sub nom*, *Hansen* v. *Udall*, 371 U.S. 901. In *Chapman*, the court held that the Secretary of the Interior could not alter the terms of a prior authorization granting pipeline right-of-way over Federal lands. In his concurrence, Judge Prettyman stated:

> "* * * the official word of a Government officer acting within the scope of his authority should be the maximum in reliability — binding and not changeable at his wish" (204 F. 2d at 54).

In the circumstances presented by the case-at-bar, the Commission's imposition of retroactive refunds upon sales made by Producers under valid orders of the Commission, which did not contain refund conditions, constitutes the exercise of the power of reparations which the Commission does not possess, *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 470 (1959); *Montana Dakota-Utilities Co.* v. *Northwestern Public Service Co.*, 340 U.S. 246, 251, 254 (1951); *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956), *cert. denied*, 353 U.S. 923.

Conclusion

For the foregoing reasons, the judgments of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

1. The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are as follows:

* * * * *

SEC. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts, or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a

temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

SEC. 7(e) Except in the case governed by the provisos contained in subsection (e) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

2. The Commission's Regulations Under the Natural Gas Act, 18 C.F.R., Subchapter E, as amended, provide in pertinent part:

Sec. 157.28. Temporary authorizations.

Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an in-

dependent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however,* That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown. [Cum. Supp. 1953.]

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

3. The Commission's *Statement of General Policy No. 61-1*, 18 C.F.R. §2.56, 24 FPC 818, is as follows:

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

STATEMENT OF GENERAL POLICY NO. 61-1

ESTABLISHMENT OF PRICE STANDARDS TO BE APPLIED IN DETERMINING THE ACCEPTABILITY OF INITIAL PRICE PROPOSALS AND INCREASED RATE FILINGS BY INDEPENDENT PRODUCERS OF NATURAL GAS

(Issued September 28, 1960)*

Before Commissioners: JEROME K. KUYKENDALL, *Chairman;* FREDERICK STUECK and ARTHUR KLINE.

This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.

Since the Supreme Court's 1954 decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 674, holding that under the Natural Gas Act the Commission has jurisdiction over the interstate transportation and interstate

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sale for resale of natural gas by independent producers, and that such producers are "natural-gas companies" under the Act, the Commission's regulatory task has increased enormously in size and difficulty. In contrast to the regulation of less than 200 pipeline companies prior to the *Phillips* case, under this decision Commission regulation extends to several thousand independent producers of natural gas. Although this producer segment of the natural gas industry differs from the pipeline transmission portion in fundamental particulars, its multiplicity of sales and services are now required to be covered by many thousands of rate and certificate filings under the Act.

This ever-growing volume of additional rate and certificate filings has placed an increasing burden not only on this Commission and other regulatory commissions, but on all those — consumers, producers, pipeline companies, and distributing companies as well — whose interests we must consider in administering the Act. It is essential, particularly in the interest of the consumer for whose protection the statute was enacted, that means be found for making the most effective use possible of the Commission's limited facilities in discharging the new and additional duties called for by the regulation of producers of natural gas. In our opinion, the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation. Our many reasons for establishing these maximum acceptable rates as opposed to establishing rates based on a full cost-rate, base hearing for every rate filing made by producers are set forth at considerable length in our opinion No. 338, *Phillips Petroleum Co.*, Docket No. G-1148, et al., pp. 542 thru 548, *ante*, issued on this date.

Some further explanation is required of certain aspects of these area rate levels. The geographical areas which we have used are convenient and well known. They are not necessarily in complete accord with geographical and economic factors which may be relevant to the establishment of pricing areas. As experience and changing factors may indicate, we will change or alter these areas from time to time in order to eliminate such inequities as may appear to exist because of our use of geographical boundaries.

In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. Of necessity, we have not set forth the adjustments to these prices which must be made to take into account every possible provision of every contract which may affect the actual price, such as Btu adjustments, conditions of delivery, etc. The relevance of such adjustments to the basic contract price and the appropriate established price standard must be considered as each filing is made. As it becomes apparent that certain adjustments have general applicability in a specific area, the area price standard will be revised and set forth in greater detail with regard to the exact sale conditions to which the rate applies. We should, however, make it clear that these present price standards apply to pipeline quality gas as that term is generally understood in each area and, except for the Louisiana prices, are inclusive of all taxes.

Two price standards are set for each area. Initial prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts. For this reason, we have found it advisable to adopt two schedules of prices, one pertaining to initial prices in new contracts and one pertaining to escalated prices in existing contracts. It is anticipated that these differences in price levels will be reduced and eventually eliminated as subsequent experience brings about revisions in the prices in the various areas.

It will be noted that we have omitted listing an initial price level for sales from Southern Louisiana and Mississippi. The proper initial price level for these areas is currently the subject of two hearings pursuant to Supreme Court Decisions. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378; *Public Service Commission* v. *F.P.C.*, 361 U.S. 195, F.P.C. Docket Nos. G-11024, *et al.*, and G-13143, *et al.*, respectively. Clearly, in light of these cases, it would not be proper at this time for us to announce an initial rate level for these areas prior to a final determination of these cases.

These price levels, as announced by Appendix A attached to this statement, are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level. As with the areas, the prices will be adjusted from time to time as such facts as may come before us compel such adjustments. For the present, and in the absence of compelling evidence calling for other action by us, proposed initial sales of natural gas by independent producers which include rates higher than those indicated in the appendix attached to this statement shall be denied a certificate or certificated only upon the condition that lower rates be filed, and all

rate changes filed under existing contracts which call for a rate exceeding the indicated price level in the attached appendix to this statement shall be suspended.

Where a proposed price exceeds the indicated rate level and is therefore conditioned or suspended we will, in determining whether the higher price is justified, not necessarily consider only the financial requirements of the individual producer proposing the price but will consider all of the above elements relevant to the industry generally in the area concerned. Similar evidence will also be required from purchasers or their customers who object to any of the price levels or any specific price. Our determination will be in the nature of setting a price for the gas itself from any source questioned and not necessarily a price applicable solely to the party proposing some other price. In this connection we urge that all parties who have any interest in changing an area price join in such a proceeding leading to a determination of a proper revision, if any, in an area price or in the geographical area itself. As there will undoubtedly be numerous parties with an interest in such a proceeding full use should be made of prehearing procedures to reduce the factual issues and consolidate factual presentations to eliminate repetition and duplication of evidence. Because of the impossibility of giving detailed instructions for every proceeding, the precise course of each hearing and the admissibility and relevant weight of each type of evidence must be determined as hearings proceed and we expect to issue additional policy statements from time to time clarifying various aspects of these procedures and principles. The new area rate determinations resulting from such proceedings will represent final determinations of just rates for the areas involved as of the date of the decision and for prior periods.

APPENDIX A

(To Statement of General Policy No. 61-1)

Area price levels for natural gas sales by independent producers

[All rates at 14.65 Psia]

Area	Initial service rates per Mcf	Increased rates per Mcf
Texas:		
District No. 1	15 cents	14 cents.
District No. 2	18 cents	14 cents.
District No. 3	18 cents	14 cents.
District No. 4	18 cents	14 cents.
District No. 5	14 cents	14 cents.
District No. 6	15 cents	14 cents.
District No. 7-b	14 cents	11 cents.
District No. 7-c	16 cents	11 cents.
District No. 8	16 cents	11 cents.
District No. 9	14 cents	14 cents.
District No. 10	17 cents	11 cents.
Louisiana:		
Southern	Not determined	13.7 cents (14 cents at 15.025 psia).
Northern	16.6 cents (17 cents at 15.025 psia)	13.7 cents (14 cents at 15.025 psia).
Mississippi	Not determined	13.7 cents (14 cents at 15.025 psia).
Oklahoma:		
Panhandle area	17 cents	11 cents.
Other	15 cents	11 cents.
Carter-Knox	16.8 cents	11 cents.
Kansas	16 cents	11 cents.
New Mexico:		
Permian Basin	16 cents	11 cents.
San Juan Basin	12.7 cents (13 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Colorado	14.6 cents (15 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Wyoming	15 cents	12.7 cents (13 cents at 15.025 psia).
West Virginia	26.8 cents (28 cents at 15.325 psia)	23.9 cents (25 cents at 15.325 psia).

APPENDIX B

SUMMARY OF THE EVIDENCE JOINTLY SPONSORED BY THE PRODUCERS AND EXCLUDED BY THE COMMISSION

Producers in the administrative proceedings below attempted to present five witnesses and eight exhibits in order to support and justify their proposed sales of natural gas for resale in interstate commerce at the contract prices. This entire evidentiary presentation was excluded by the Commission but was submitted as an offer of proof.[1] The following is a summary of Producers' joint presentation:

(1) Frith C. Owens, a consulting geologist and petroleum engineer from Corpus Christi, Texas, with over twenty years of experience specializing in the exploration for oil and gas in the Texas Railroad Commission District No. 4 presented testimony and exhibits on the prospects for further gas exploration and development in the deep sedimentary horizons or formations underlying that area. (I R. 214-216)

After outlining the history of oil and gas exploration and development in District No. 4, (I R. 220-222) Mr. Owens demonstrated that most of the gas from the shallower formations had been found and developed in District No. 4 (I R. 226) but that there are deep sedimentary geological horizons or formations underlying the geographic area comprising that district which at this time are relatively unexplored. (I R. 217-219; 1161) Mr. Owens' analysis of the deeper exploration accomplished in District No. 4 up to the present time resulted in the conclusion that these deep formations (below 6,000 feet) were clearly in the gas province. (I R. 216, 219-220; 227-228, 1164) Mr. Owens specified

[1] This testimony is contained in the Joint Appendix and related exhibits filed in the court below, copies of which were filed in this Court concurrently with the Petition for Certiorari in No. 60.

the deep formations underlying District No. 4, to which those seeking to find new supplies of natural gas would be able to direct their search. (I R. 224-226) However, Mr. Owens concluded that a price incentive was necessary to encourage the finding and development of the deeper gas reserves located in this area, because such exploration and development requires more complex, and thus more expensive, activities to find and develop the reserves. (I R. 231) Paramount in these higher costs are the drilling costs which increase significantly with greater depth. (I R. 231-232)

Mr. Owens also concluded, after enumerating the activities necessary for exploration and development of new gas supplies, (I R. 230-232) that the greater risk in locating and bringing the market the deep supplies of gas required sufficient incentive "by adequate and firm gas prices. Without this incentive in my opinion, this exploratory effort cannot be accomplished." (I R. 233)

(2) Sherman H. Clark, a fuels economist with the Stanford Research Institute, Menlo Park, California, presented a study prepared under his direction by the Stanford Research Institute showing the estimated growth in demand for natural gas in each year during the period from 1960 through 1970. (I R. 236-240)

Exhibit No. 6 which tabulated and recorded the results of Mr. Clark's studies and projections, contained detailed data including graphs, charts and tables showing the past and projected demand of the various areas of the country for natural gas by end use. These end uses included residential, commercial, refinery, pipeline, other industrial steam-electric and carbon black.

On the basis of the Stanford Research Institute study, Mr. Clark concluded that the increase in demand for natural gas in the United States would increase by approximately 3.5% each year from 1960 through 1970. (I R. 1165-1264) The net domestic production required

to meet the demand for natural gas in 1960 was 13.3 trillion cubic feet. (I R. 249, 1165-1264) Mr. Clark estimated that net domestic production would have to increase to approximately 15.9 trillion cubic feet in 1965 and 18.9 trillion cubic feet by 1970 in order to meet the increased demand for natural gas. (I R. 249, 1165-1264)

(3) Radford L. Schantz, a consulting economist from Washington, D.C. presented testimony and Exhibit No. 7 directed to whether the contracts involved in this proceeding are required by the public convenience and necessity. (I R. 284) Mr. Schantz examined comprehensive economic data contained in Exhibit No. 7 and considered trends in the exploration and development of gas supplies, productivity of the exploratory and drilling effort, cost, prices, supply and demand for gas and the available markets for the gas produced in Texas Railroad Commission District No. 4. (I R. 285-286) Based on his analysis of these factors, Mr. Schantz concluded that supplies of natural gas had declined relative to net production and prospective demand, as estimated by Mr. Clark, so as to cause concern with respect to the adequacy of future supplies. (I R. 322) He also concluded that rising drilling and related costs in the Texas Gulf Coast Area (including Texas Railroad District No. 4), as well as a reduction in the contract prices for sales made from that area by the Federal Power Commission had definitely impaired incentives to find and develop the necessary supplies of natural gas. (I R. 323) With respect to future supplies of gas, Mr. Schantz observed that a serious time lag exists between the decision to explore and the discovery of new gas supplies. Consequently, the incentive to find these new future supplies must be given today, not when a shortage occurs. (I R. 323)

Mr. Schantz also testified that the rapid industrial growth in the Texas Gulf Coast Area has created an effective alternative market for new supplies of gas found in District No. 4 despite sales in 1960 and 1961

at 18¢ per Mcf covering approximately 38% of the gas produced in that district. (I R. 324)

Exhibit No. 7 (I R. 1265-1355) presented by Mr. Schantz contained, except for working papers, the data and materials on which Mr. Schantz based his conclusions and from which he gave his opinions, as well as a listing of all contracts filed with the Federal Power Commission for the sale of new supplies of gas produced in District No. 4 from 1960 through July, 1962.

Based on his analysis and these considerations, Mr. Schantz concluded that the initial contract prices proposed by producers, up to and including 18¢ per Mcf were required by the present and future public convenience and necessity. (I R. 322)

(4) R. H. Park, Assistant Division Manager, Gas Division, Texaco Inc., Houston, Texas, presented a study on the minimum financial requirements for finding and developing new supplies of natural gas if producers are to keep supplies in pace with increased demand. (I R. 341) Mr. Park analyzed the recent productivity of gas well drilling in the industry which in his study is the relationship between the gas reserves added and the expenditures which must be made by producers to add those reserves. (I R. 344-345) In Exhibit No. 8 (I R. 1356-1373), Mr. Park provides the Commission with an estimate of the minimum unit cost per Mcf of marketed production required to add new reserves of natural gas based on the industry's recent aggregate experience in the producing industry.

On the basis of his study, Mr. Park concluded that in order to meet the Producers' minimum financial requirements, it is necessary to have a nation-wide average price level for current resales of natural gas of approximately 23¢ per Mcf. (I R. 348, 1358-1359) Mr. Park reasoned that this nation-wide average price level is necessary in order to permit producers to recover their capital expenditures, their current operating expenses, royalty payments and production taxes. (I R. 348)

Mr. Park specifically related the use of the industry-wide financial requirements to the determination of an appropiate initial price for new sales of gas produced in Texas Railroad Commision District No. 4 and recommended that any price level for District No. 4 should not be less than 18¢ per Mcf. (I R. 379-381)

(5) Douglas L. Henry, an engineer for Gulf Oil Corporation, Houston, Texas, presented data on the average depth of wells producing gas upon which the Commission predicated the 15¢ per Mcf "in-line" price, as compared with the deeper average depth of Gulf wells producing the gas sold to Natural Gas Pipeline Company of America from the Escobas and Martinez Fields.[2] (I R. 451-455)

Mr. Henry also compared Gulf's costs to drill and complete its shallower wells (approximately 5,000 feet) in District No. 4 with its cost to drill and complete the deeper wells (over 12,000 feet) committed to its contract and concluded that the deeper wells were 379% more expensive. (I R. 455-456)

Utilizing industry data, Mr. Henry estimated the cost to drill and complete a well to the average depth of wells upon which the Commission predicated its 15¢ per Mcf "in-line" price in its *Skelly* decision and shows that this estimated cost was substantially less than the actual cost incurred by Gulf in drilling its deeper wells.

In addition, Mr. Henry testified that even at the contract price proposed, including all of the price escalations, the revenues generated by Gulf's sale would provide Gulf with barely a 9% return on its average investment after recovery of only the on-lease development and producing costs. (I R. 457)

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[2] This portion of Mr. Henry's testimony concerning comparisons was admitted by the Examiner, but not considered by the Commission in reaching its decision.

SUPREME COURT, U. S.

DEC 13 1967

JOHN F. DAVIS, CLERK

IN THE

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OPINIONS BELOW

The opinion of the Court of Appeals to which this brief is directed is reported at 373 F.2d 816. The court opinion is based upon two different administra-

tive records which resulted in two different opinions of the Federal Power Commission (herein referred to as Commission), known as the *Hawkins* case and the *Sinclair* case.[1] The opinion and order of the Commission in the *Hawkins* case, involving sales in Texas Railroad Commission District No. 3 (III R. 7292-7317), are reported at 34 FPC 897 (1965); its opinion and order on rehearing in *Hawkins* (III R. 7505-7508) is reported at 34 FPC 1330 (1965). The opinion and order in the *Sinclair* case, involving sales in Texas Railroad Commission District No. 2 (IV R. 4172-4193), are reported at 34 FPC 930 (1965); the opinion on rehearing in *Sinclair* (IV R. 4283-4287) is reported at 34 FPC 1357 (1965).

JURISDICTION

The judgment of the Court of Appeals reversing and remanding to the Commission for further proceedings was entered on February 7, 1967. The petitions for writ of certiorari were timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Federal Power Commission's authority to issue certificates of public convenience and necessity is prescribed in Section 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 821, 825, 15 U.S.C. 717f(c), (e), the pertinent parts of which are reproduced in Appendix B attached hereto.

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[1] See Appendix A for a narration of the manner in which these proceedings arose and how they relate to the consolidated proceedings arising out of the Court of Appeals for the Tenth Circuit.

QUESTIONS PRESENTED

1. Whether. in determining the level of the "in-line" price at which a certificate will issue, the Commission has the power to consider *inter alia,* "current conditions" in the industry, which include contract prices, temporary certificates, intrastate market competition, and the effect of its own policies on those conditions, or whether the Commission is limited to a consideration solely of selected prices which have not been opposed by any party and hence, having been permanently certificated, are no longer subject to review?

To restate the question in more basic terms, having once determined the price "line" in a given area, is the Commission divested of jurisdiction to change that "line" in a certificate proceeding because of unilateral action of intervenors in opposing all prices above their own preselected price level?

2. Did the Commission abuse its discretion in holding that questions of pipeline and public need for gas may be determined in pipeline certificate proceedings instead of in producer certificate proceedings?

STATEMENT OF THE CASE

The decision of the court below involves review of two proceedings before the Commission which, in turn, involved approximately seventy-five producer applications for certificates of public convenience and necessity. In one of the consolidated proceedings, the *Hawkins* case,[2] relating to sales in Texas Railroad Commission District No. 3, the Commission authorized ap-

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[2] H. L. Hawkins & H. L. Hawkins, Jr., Operator, *et al.*, Opinion No. 475, issued September 22, 1965, (III R. 7288-7316). The case takes its name from the designation of the lead docket in the consolidated proceedings before the Commission.

proximately three dozen producer sales conditioned to in-line prices of 16.0 cents prior to September 28, 1960, and 17.0 cents per Mcf after September 28, 1960. In the other proceedings, the *Sinclair* case,[3] relating to sales in Texas Railroad Commission District No. 2, the Commission authorized approximately forty producer sales conditioned to in-line prices of 15.0 cents prior to September 28, 1960, and 16.0 cents per Mcf after September 28, 1960. Only the in-line prices for the period after September 28, 1960, were remanded by the Court of Appeals and only these prices are here on review.[4]

In each of the consolidated proceedings the Commission based its determination of the in-line prices upon its analysis of current conditions in the area during the periods when the contracts in question were executed. Its determinations in these cases, together with its opinions in other in-line price cases issued at about the same time,[5] constitute the culmination of the Commission's in-line price technique utilized to fix the levels at which producers' gas may enter the interstate market. In order to place the Commission's in-line price

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[3] Sinclair Oil & Gas Co., *et al.*, Opinion No. 476, issued September 22, 1965 (IV R. 4168-4193). Like the *Hawkins* case, this case takes its name from the company whose docket leads the list in the consolidated proceedings at the Commission level.

[4] The Court of Appeals for the District of Columbia Circuit is referred to herein as "Court of Appeals."

[5] The Commission's Opinion No. 422 in Amerada Petroleum Corp. (I R. 5768-5804) was reviewed by the Court of Appeals for the Tenth Circuit and is consolidated herewith in Case Nos. 60, 61, and 62. Other proceedings, involving sales in the South Louisiana Area, have been the subject of review proceedings in Pan American Petroleum Corp. v. F.P.C., 376 F.2d 161 (10th Cir. 1967), petitions for certiorari pending in Case Nos. 227, 415, 516, and in Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967), petitions for certiorari pending in Case Nos. 504, 520, 526, and 628.

method in proper context, it is appropriate to trace the history of development of the in-line price cases from its inception with the CATCO case.

In the wake of this Court's CATCO[6] decision, the Commission embarked on a new type of regulation under Section 7 of the Natural Gas Act.[7] The first step in this new method was issuance of the Statement of General Policy No. 61-1.[8] Drawing on its expertise, the Commission divided the gas producing areas of the United States into pricing areas announcing "guideline prices" in each area. For each of the "pricing areas"[9] in the Texas Gulf Coast, the guideline price was set at 18 cents per Mcf, although the Commission had previously permanently certificated sales at prices as high as 20 cents per Mcf[10] in Texas Railroad District No. 3.

The Commission then attacked its large "backlog" of certificate applications by announcing that all pending certificate applications, and all applications filed thereafter, would be approved at uncontested hearings,

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[6] Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959).

[7] Prior to CATCO, the Commission considered producer certificate applications on an individual basis, or consolidated groups of producer applications with the pipeline application for a certficate for the facilities required to connect the new supplies furnished by the producers.

[8] 24 FPC 818: This Court commented on the Commission's new approach to certificate cases in *Second Phillips,* Wisconsin v. F.P.C., 373 U.S. 294, 307, 308 (1963).

[9] The Commission conformed its pricing areas in the Texas Gulf Coast to the Districts delineated by the Texas Railroad Commission as District Nos. 2, 3, and 4. Cases Nos. 60, 61, 62, 80, and 97 involved Railroad District No. 4, and Cases Nos. 111, 143, 144, and 231 involve Railroad Districts 2 and 3.

[10] Trunkline Gas Co., 21 FPC 704 (1959).

would unduly lengthen the proceedings. It was sustained in this discretionary decision first by the D.C. Circuit in *Public Service Commission of New York* v. *F.P.C.*[21] and later by this Court in *United Gas Improvement Co.* v. *Callery Properties, Inc.* (*Callery*).[22] Until the issue of the Commission's discretion to decline to consider such evidence was resolved, however, the producers continued to tender such evidence. Such evidence was tendered in this case (in both the *Sinclair* and *Hawkins* cases), but was denied admission by the Examiners and this denial was affirmed by the Commission (III R. 7299; IV R. 4183-4).

On the same day that the Commission issued its *Skelly* decision, the Commission amended the Statement of General Policy reducing the guideline price in Texas Railroad Commission District No. 4 from 18 cents per Mcf to 16 cent per Mcf.[23] In *Texaco Seaboard*,[24] the Commission determined the in-line price for Texas Railroad Commission District No. 3 to be 16 cents prior to September 28, 1960, and concurrently therewith reduced its guideline price in District No. 3 from 18 cents to 17 cents. No appeal was taken from

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[21] 329 F.2d 242 (D.C. Cir. 1964); *cert.* denied, 377 U.S. 963 (1964).

[22] 382 U.S. 223 (1965).

[23] 28 FPC 441; the court below appears to have been under the erroneous impression that the Commission first determined the in-line price and then fixed the guideline price above it. See IV R. 4309. In fact, the reverse situation occurred. The Commission determined the guideline price first and then fixed the in-line price *below* it. In fact, it should be recalled that at the time when Post-Policy Statement contracts involved here were entered into and temporary certificates were issued *there was no in-line price.* It was after this period that the Commission retrospectively fixed in-line prices of 15 cents per Mcf (District 2) and 16 cents (District 3) for pre-Policy Statement sales.

[24] 29 FPC 593 (1963).

this Commission order. In *Hassie Hunt Trust,*[25] the Commission determined the in-line price prior to September 28, 1960, to be 15 cents for Texas Railroad Commission District No. 2, and concurrently reduced its Statement of General Policy guideline price for this area from 18 cents to 16 cents.[26] *In each of these cases the Commission expressly found that the record was not adequate to determine the in-line price for the period after September 28, 1960, and deferred this decision to another proceeding to specifically deal with this issue.*[27]

The proceedings dealing expressly with determination of the in-line price subsequent to September 28, 1960, are the three Commission cases here under review, designated by their lead dockets in the Commission as *Amerada*[28] (Railroad District No. 4), *Hawkins*[29] (Railroad District No. 3), and *Sinclair*[29] (Railroad District No. 2). *Hawkins* and *Sinclair* included some dockets involving sales prior to September 28, 1960, which had been involved in a prior appeal[30]

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[25] 30 FPC 1438 (1963).

[26] 30 FPC 1435 (1963).

[27] *Skelly,* 28 FPC 412 (1962); *Texaco Seaboard,* 29 FPC 599 (1963); *Hassie Hunt Trust,* 30 FPC 1442-44 (1963).

[28] Affirmed, Sunray DX Oil Company v. F.P.C., 370 F.2d 181 (10th Cir. 1966), Case Nos. 60, *et al.* A fourth case, also dealing with Railroad District No. 4, entitled *Turnbull & Zoch,* in the Commission, was affirmed by the Fifth Circuit in Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967), applications for certiorari pending. Case Nos. 504, 520, 526, and 628.

[29] Consolidated in the D.C. Circuit and reversed, Public Service Commission of New York v. F.P.C., 373 F.2d 816 (D.C. Cir. 1967), Case No. 111, *et al.*

[30] Public Service Commission of New York v. F.P.C., 295 F.2d 140 (D.C. Cir. 1961), *cert.* denied, *sub. nom.* Shell Oil Company v. Public Service Commission of New York, 368 U.S. 948 (1961).

provided the sales were at prices equal to or less than the announced guideline prices, and provided further that there were no interventions filed. If an opposing party intervened, no certificate would be issued except after a contested hearing, even though the price for which approval was sought was equal to or less than, the guideline level. Certain distributor companies[11] and the Public Service Commission of New York adopted the practice of intervening in substantially all producer certificate dockets involving proposed sales in the Texas Gulf Coast Area where the initial price provided in the contract exceeded a level of 14-15 cents per Mcf.[12]

Because of the policy followed by the intervenors,[13] contested hearings were necessary, resulting in the ac-

[11] The Brooklyn Union Gas Company, Long Island Lighting Company, and the Philadelphia Gas Works Division of the United Gas Improvement Company, petitioners in Cases Nos. 62 and 97, and respondents in Cases Nos. 111, 143, and 144, were among the more active intervenors.

[12] See, Public Service Commission of New York v. F.P.C., 329 F.2d 242, 250, note 8 (D.C. Cir. 1964).

[13] We will refer to The Brooklyn Union Gas Company, Long Island Lighting Company, and Philadelphia Gas Works Division of the United Gas Improvement Company, and the Public Service Commission of New York collectively as "Intervenors" because these parties appeared in that capacity in the proceedings before the Commission. Under Commission regulations, the Public Service Commission of New York can intervene as a matter of right in any Commission case, Public Service Commission of New York v. F.P.C., 295 F.2d 140 (D.C. Cir. 1961), *cert.* den. *sub. nom.*, Shell Oil Co. v. Public Service Commission of New York, 368 U.S. 948 (1961). As a matter of policy the Commission has uniformly granted the intervention of the distribution companies when requested to do so even though the granting of such interventions required the holding of a contested hearing on a rate which would otherwise have been approved under the Commission's shortened procedure provided by its Rules for uncontested cases.

cumulation of a large number of pending producer applications. While in most of the other pricing areas of the United States[14] the Commission was able to consolidate all pending certificate applications in an area into one proceeding, no less than seven contested hearings were required to determine the in-line price in the three Texas Railroad Commmission Districts making up the Texas Gulf Coast Area,[15] because of inter-

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[14] The only other pricing area requiring extensive litigation was the Southern Louisiana Area, in which the same intervenors were heavily involved.

[15] The certificate cases determining the in-line prices in the pricing areas in the Texas Gulf Coast, each involving many consolidated dockets, are listed as follows:

1. Skelly Oil Co., 28 FPC 401 (1962); affirmed, *sub. nom.*, Public Service Commission of New York v. F.P.C., 329 F.2d 242 (D.C. Cir. 1964); *cert.* den. *sub. nom.*, Prado Oil & Gas Corp. v. F.P.C., 377 U.S 963 (1964).
2. Texaco Seaboard Inc., 29 FPC 593 (1963).
3. Amerada Petroleum Corp., 31 FPC 623 (1964); affirmed on the in-line issue, Sunray DX Oil Co. v. F.P.C., 370 F.2d 181 (10th Cir. 1966); certiorari granted and consolidated with instant case (I. R. 6782-6786), Cases Nos. 60, 61, 62, 80 and 97.
4. Hassie Hunt Trust, Operator, 30 FPC 1438 (1963); affirmed Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967).
5. H. L. Hawkins and H. L. Hawkins, Jr., 34 FPC 897 (1965); reversed Public Service Commission of New York v. F.P.C., 373 F.2d 816 (D.C. Cir. 1967)—certiorari granted, Cases Nos. 111, 143, 144 and 231 (IV R. 4326-29).
6. Sinclair Oil & Gas Co., 34 FPC 930 (1965); consolidated with the *Hawkins* case on review in the District of Columbia Circuit, reversed, Public Service Commission of New York v. F.P.C., 373 F.2d 816, the cases here on certiorari, *supra.*
7. Turnbull & Zoch Drilling Co., 34 FPC 1001 (1965), consolidated with the Hassie Hunt case on review in the Fifth Circuit, affirmed, Continental Oil Company v. F.P.C., 378 F.2d 510 (5th Cir. 1967) petitions for certiorari pending in Cases Nos. 504, 520, 526 and 628.

venors' policy of intervening in cases involving prices which were at or below guideline levels.

The Commission grouped the producer certificate applications in two ways, first, according to the pricing area (*e.g.*, Texas Railroad Commission District) in which the sale took place, and second, according to the date the contract of sale was entered into. Sales to different pipelines were grouped together indiscriminately. The related pipeline certificate applications for the necessary facilities were considered in separate proceedings in which the pipelines' supplies and markets (the pipelines' "need" for the gas) were issues, and without exception, and in most instances without contest, the pipeline certificates were granted.[16]

Because of the long procedural delays involved in obtaining permanent certificates in contested proceedings (*e.g.*, two Shell dockets in this case have been pending before the Commission or the Courts since 1959), and because in some instances drainage was caused by other wells in the same fields already certificated by the Commission, and because the producers were required to pay "shut-in" royalties and suffer a delay in the return of their investments, the producers were compelled by economic necessity to apply for and accept "temporary authorizations" to commence deliveries while the certificate applications were pending. Although no formal hearing was required to obtain these temporary authorizations,[17] the Commission

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[16] One pipeline certificate application, involving Lone Star Gas Company was later withdrawn, but the sale of gas continued to other markets. See, "Order Vacating Certificates and Permitting Abandonment," issued September 15, 1967, Lone Star Gas Co., *et al.*, Docket Nos. CP 65-118, *et al.*

[17] Public Service Commission of New York v. F.P.C., 327 F.2d 893 (D.C. Cir. 1964).

utilized its authority to "hold the price line" even here, by customarily imposing one or more of three types of conditions: (1) a price condition reducing the price to the Commission's guideline price,[18] (2) a further price condition imposing an express refund obligation down to a specified level, at or below the guideline price level, and (3) a condition which precluded the producer from filing a rate increase under Section 4 of the Natural Gas Act.[19] The Commission's power to impose these conditions in a temporary certificate has been sustained by this Court in *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964).

In its *Skelly* decision issued August 30, 1962,[20] the Commission determined the in-line price in Texas Railroad Commission District No. 4 for the period *prior to September 28, 1960,* the date of the Statement of General Policy No. 61-1, to be 15 cents per Mcf. The Commission specifically reserved decision on what the in-line price was in that pricing area after that date, stating it would convene a separate hearing on that issue, 28 FPC 412. In the *Skelly* decision the Commission also determined, for the first time, that it would not consider cost and economic evidence supporting the producers' contract prices in a certificate case under Section 7 of the Natural Gas Act, finding that to do so

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[18] The "guideline price" refers to the price level fixed by the Commission in the Statement of General Policy No. 61-1, as changed by various amendments. The "in-line" price refers to the price determined for a pricing area by the Commission in a contested certificate proceeding under Section 7 of the Act.

[19] Various dockets consolidated in these cases show examples of these types of conditions, imposed by the Commission in the temporary certificates issued—see III R. 1414-20; III R. 7302-4; IV R. 709-14; IV R. 4189-92.

[20] Skelly Oil Co., 28 FPC 401.

in which the Commission was held to have erred in excluding the Public Service Commission of New York as an intervenor.

Having decided to follow its *Skelly* rule and exclude all cost and economic evidence tendered by the producers in these cases, the Commission then proceeded to consider the evidence which remained. The Commission gave primary weight to permanently certificated sales, but realized that if it looked only to these sales it would be excluding from consideration the vast majority of the sales of gas in interstate commerce from the area. In *Amerada,* the Commission found that to look only to permanently certificated sales would be to base the in-line price on only *1.39 per cent* of the volumes being sold, which was less than the volumes sold under only two dockets in the case being considered (IR. 5784). In Texas Railroad, District No. 4, the Commission (I R. 5786) found that 82 per cent of the gas presently moving in interstate commerce was at 16 cents or above. The weighted average price was 16.5 cents with contract prices ranging up to 20.045 cents per Mcf (I R. 5786). The Commission selected as the "in-line" price the "lowest price at which substantial volumes of new gas were sold in interstate commerce in the period in question" (I R. 5789). The Commission further stated that "While there is evidence that points in the direction of a higher price, we believe the teachings of CATCO require that we draw the line at the *lowest reasonable level.*"[31] (I R. 578). Finally, the Commission concluded:

> "Our decision herein draws the line substantially below the average going price for gas in the area

[31] Emphasis supplied throughout unless otherwise indicated.

and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed. The 16-cent determination herein thus not only preserves, but actually rolls back, the initially considered price line for the period in issue." (I R. 5790).

In the *Hawkins* case in District 3, the Commission reaffirmed on this record its holding in *Texaco Seaboard*[32] and *Hassie Hunt*[33] that the in-line price for the pre-Policy Statement period was 16 cents per Mcf (III R. 7296). The Commission then considered the permanently certificated prices arrayed by Staff and producer witnesses for the post-Policy Statement period, noting that 42.6 per cent of the volumes of gas being sold under permanent certificates were at a price of 18 cents per Mcf (III R. 7295). Here again, the volumes of gas being sold under temporary certificates in the contested proceedings required by the interventions vastly exceeded the volumes for which permanent certificates had issued (all in uncontested proceedings). The Commission therefore gave "some weight" to contract prices and temporarily certificated prices, because it found, as in *Amerada,* that to fail to consider these prices would result in a "freeze of the price line" because of the obivous fact that many of the prices above the arbitrarily determined "acceptable level" of the intervenors were contested and therefore fell into the "temporarily certificated" category (III R. 7296). In addition to the contract and certificate prices, the Commission also considered evidence of the impact of its guideline price on subsequent negotiations between

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[32] 29 FPC 593 (1963). No appeal filed.

[33] 30 FPC 1438 (1963), affirmed, Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967).

producer and pipeline, which showed that the producers had voluntarily reduced their prices in many instances to conform to the Commission's guideline prices (III R. 226; 333).

A similar pattern to that discussed above in Districts 4 and 3 was disclosed by the record in *Sinclair* for Texas Railroad Commission District 2. The Commission reaffirmed its determination of the pre-Policy Statement line in *Hassie Hunt* at 15 cents per Mcf and that decision was not disturbed by the court below. As to the period following the issuance of the Policy Statement the Commission determined the price line to be 16 cents per Mcf, relying on evidence similar to that considered in *Hawkins* and *Amerada*. Specifically, the Examiner found that 83.36 per cent of the gas moving in interstate commerce from District 2 under contracts executed after the Policy Statement was priced at 16 cents per Mcf or more (IV R. 3918). By including contracts below 14 cents in the tabulation, the Commission found that even then 53 per cent of the volumes were being sold at prices above 16 cents per Mcf (II R. 4181). Here again the volumes sold under temporary certificates exceeded those under permanent certificates, and the Commission found that to limit the price consideration only to those certificates which the intervenors had permitted to become permanent without contest would create a prize freeze and render the hearing in this proceeding meaningless (IV R. 4180). As the Commission noted:

> "The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested." (IV R. 4180)

In each of the three decisions the Commission made mention of the fact that the uncontested sales, which

constituted the bulk of the permanent certificates, were issued for "isolated" sales of small volumes which were remote from the pipelines and, therefore, could not command the going market prices. It found that to base the price line on such sales would be to ignore the direction of this Court in *Callery*—and of the various Circuit Courts[34] that the line must be based on sales of *substantial* volumes in interstate commerce under *contemporaneous* conditions.

The Intervenors had also argued to the Commission in *Hawkins* and *Sinclair* that the producer sales should not be certificated because of allegedly adverse take-or-pay positions of the pipeline purchasers.[35] But they offered no evidence to support their contentions, or to show how general allegations could be specifically related to the instant sales. In contrast, the evidence adduced by producer-applicants does show the take-or-pay status of the several pipeline purchasers (III R.

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[34] United Gas Improvement Co. v. F.P.C., 283 F.2d 817 (9th Cir. 1960); Atlantic Refining Co. v. F.P.C., 316 F.2d 677 (D.C. Cir. 1963); Sohio Petroleum Co. v. F.P.C., 298 F.2d 465 (10th Cir. 1961); California Oil Co., Western Div. v. F.P.C., 315 F.2d 652 (10th Cir. 1963); Public Service Commission of New York v. F.P.C., 329 F.2d 242 (D.C. Cir. 1964); California v. F.P.C., 353 F.2d 16 (9th Cir. 1965)

[35] A common provision in gas sales contracts between producers and pipelines is the "take-or-pay" provision pursuant to which, over a specified period of time—usually one year, the purchaser is required to take an average quantity of gas or pay for it A make-up period is also provided which permits the pipeline to take additional quantities of gas in later periods to make up the earlier underproduction. When a pipeline, for a variety of reasons, makes prepayments for gas not yet taken, it may be said that it is in an adverse take-or-pay position. Significantly, however, the prepayment for gas does not mean that the pipeline forfeits the gas. There is no indication in these proceedings that any pipeline has not been able to schedule make-up gas at later dates.

1336-1339). Some of the pipelines, namely, Natural Gas Pipeline Company of America and Trunkline Gas Company, did not have any prepayments (III R. 1338). Others had made relatively minor prepayments, which the producer witness testified without contradiction, could be traceable to contracts in South Louisiana which are not involved here (III R. 1333-1339, 1337).

Based upon this record and its own expert knowledge of how pipeline companies must schedule their purchases, the Commission concluded the issue of need could properly be confined to pipeline certificate proceedings (III R. 7293). However, in the exercise of its judgment, the Commission did attach to each certificate a condition making the take-or-pay provision in the gas sales contract subject to a pending rule-making proceeding in Docket No. R-199. Subsequently, when the Commission later issued its Order No. 334, in Docket No. R-199, which extended the make-up periods under all certificates to a minimum of five years, its action applied to these sales.

Petitions for review of the Commission's decision in *Amerada* were filed in the Tenth Circuit Court of Appeals, and of the Commission's *Hawkins* and *Sinclair* decisions in the District of Columbia Circuit Court of Appeals, resulting in conflicting decisions by the Circuit Courts below.[36] This Court granted certiorari and consolidated these cases for briefing and argument (I R. 6782-6; IV R. 4326-9).

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[36] Contemporaneous appeals of the Commission's Turnbull & Zoch Drilling Co., Opinion No. 478, 34 FPC 1001 (1965), and *Hassie Hunt* decision were filed in the Fifth Circuit Court of Appeals resulting in affirmance of the Commission on this issue by the Fifth Circuit in Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967).

STATEMENT OF POSITION

Petitioners joining in this brief were parties to the *Hawkins* and *Sinclair* cases before the Commission, and intervenor-respondents in support of the Commission in review of these cases by the District of Columbia Circuit.[37] These Petitioners support the validity of the Commission-determined in-line prices and the Commission determination to consider questions of pipeline and public "need" for the gas in a pipeline certificate proceeding rather than a producer certificate proceeding,[38] believing both decisions of the Commission to be based on substantial evidence and within the discretion granted to the Commission under the Natural Gas Act, as explained by prior decisions of this Court. In the *Hawkins* and *Sinclair* cases, the Court of Appeals did not reach the issue of the existence or extent of the power of the Commission to require refunds, as prior to its decision no refunds had been ordered.[39] Since that issue is not present here, it is not covered by this brief.

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[37] One of the petitioners was also a party to the *Amerada* case before the Commission (Humble Oil & Refining Company), while others (Shell Oil Company, Skelly Oil Company, and Mrs. James R. Dougherty, *et al.*) were not. Because of the difference in the records in the Commission and the courts below, separate briefs are being filed by the parties to the Tenth Circuit and D.C. Circuit cases.

[38] The latter question was not raised in the Petition for Certiorari filed by Shell Oil Company, Case No. 111. To the extent permitted by the Court's Rules, Shell joins in the argument set out herein on the "need" issue.

[39] Except where the temporary certificates issued by the Commission expressly authorized refunds (III R. 7302-4; IV R. 4190-91).

SUMMARY OF ARGUMENT

In CATCO,[40] this Court announced the rule that the Commission could not issue a certificate without substantial evidence supporting the price level for the sale of gas by an independent producer to an interstate pipeline company. In *Callery*,[41] this Court sustained the Commission in the procedure which it had adopted after CATCO to determine the price level in the various gas producing areas of the United States. In this case this Court is asked to determine whether any party, through selective interventions in producer certificate cases before the Commission, can "freeze" or reduce the price "line," even though in the exercise of its discretionary power to consider current conditions the Commission finds, upon the basis of substantial evidence, that the price line has changed from that existing in an earlier time period. We believe that inherent in the Commission's power to determine the price line, is the power to determine that the line has changed and the Commission did not abuse its discretion in considering evidence leading to that result.

Further, the Court of Appeals improperly substituted its judgment for the expert administrative judgment of the Commission to determine where issues of pipeline and public need should be decided. On the narrow take-or-pay issue raised by the Intervenors, the Commission was amply justified, both by its expert knowledge of the nature of the gas business and by substantial record evidence, in protecting the public interest through attaching appropriate conditions to

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[40] Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378 (1959).

[41] United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965).

the producer certificates, subjecting the certificates to rule-making proceedings in Docket No. R-199.

Moreover, the lower court's *sua sponte* suggestion that the Commission should determine the relative superiority of the end-use for gas before authorizing a producer sale to pipeline fails to recognize the nature of the gas business and is inconsistent with this Court's decision in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) and should be reversed. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-499 (1955).

ARGUMENT

I. THE EFFECT OF THE DECISION BELOW IS TO "FREEZE" THE PRICE LINE AFTER IT HAS ONCE BEEN DETERMINED BY THE COMMISSION, OR TO "ROLL IT BACK" TO THE PRICE LINE EXISTING IN AN EARLIER PERIOD.

A. The Cumulative Effect of the Intervenors' Actions of a Procedural Nature

If the decision of the court below is sustained, it will mean that merely by the act of intervention, intervenors and others so disposed, will be able to freeze or "rollback" the price line in the Texas Gulf Coast Area to levels in existence ten years or more ago, despite increases in costs, changes in market conditions, in trends in gas exploration and in reserve additions, in contract prices and other relevant developments; also despite actions of the Commission to stabilize prices in this area pending its determination of a just and reasonable rate in the Texas Gulf Coast Area Rate Proceeding, now awaiting decision by the Commission's Examiner. The Intervenors have proceeded in the following manner:

1. The Intervenors determined that a price of 14-15 cents was "acceptable" to them. No plausible rea-

son has ever been given, either in evidence filed in a Commission proceeding or in any brief filed with the appellate courts, for the selection of this level.

2. These interventions were filed in substantially all cases involving sales of gas from the Texas Gulf Coast Area which exceeded their pre-selected level of 14-15 cents, whether or not the gas sold was serving consumers in the area in which Intervenors were interested. Initially, the Commission denied some of these petitions to intervene and notices of intervention on the grounds that the intervenors had no standing to represent consumers in other parts of the United States.[42] The New York Commission appealed the ruling of the Commission, and the District of Columbia Circuit reversed, holding that the New York Commission had the absolute right under the Commission's Rules to intervene in all producer certificate cases in the Texas Gulf Coast Area, regardless of whether the gas was serving New York markets.[43] This Court denied *certiorari*.[44] Thereafter, the Commission granted all petitions to intervene and notices of intervention filed by Intervenors.

3. After the issuance of the Statement of General Policy No. 61-1 by the Commission providing for a guideline price of 18 cents for the entire Texas Gulf Coast Area in September, 1960, the Intervenors continued to intervene in subtsantially all

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[42] Note this Court's language in *Second Phillips*, Wisconsin v. F.P.C., 373 U.S. 294, 305 (1963).

[43] Public Service Commission of New York v. F.P.C., 295 F.2d 140 (D.C. Cir. 1961).

[44] Shell Oil Co. v. Public Service Commission of New York, 368 U.S. 948 (1961).

producer certificate cases in that Area under Section 7 of the Natural Gas Act where the initial contract price exceeded their arbitrary level of 14-15 cents. Under the procedure adopted by the Commission, these interventions compelled a contested hearing, even though the contract price was equal to, or less than, the guideline price. The Commission consolidated large numbers of these producer certificate cases into joint proceedings, requiring at least two years to complete at the Commission level, and 5-7 years when court review is added.[45]

During this period there were a number of sales, usually involving small volumes at remote distances from the pipeline connections, where the producer was unable to sell his gas for more than the 14-15 cent level selected by Intervenors.[46] As these sales were at or below the Intervenors "acceptable level," no interventions were filed. Under Commission practice, permanent certificates were issued for these sales in uncontested procedings, usually within 90 days after the application was filed.

4. Intervenors sought to exclude all cost and economic evidence which the producers attempted to introduce to show that their contract prices were "in the public convenience and necessity" on the grounds

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[45] The *Amerada* case was convened by Commission order issued August 30, 1962, the *Sinclair* case on March 25, 1964, and the *Hawkins* case on March 30, 1964. Both *Sinclair* and *Hawkins* included some producer dockets involved in the earlier Commission "Coastal" proceeding in which the Commission's order granting certificates was set aside for failure to permit the New York Commission to intervene, see Public Service Commission of New York v. F.P.C., 295 F.2d 140, *supra*, p. 20.

[46] The Commission discussed the nature of these unrepresentative sales at page 16 of its *Amerada* decision (I R. 5787).

that consideration of this evidence would unduly delay the determination of the price "line" and the issuance of permanent certificates. In the *Skelly* decision[47] the Commission adopted the Intervenors' position, and after extensive litigation the discretionary power of the Commission to exclude cost and economic evidence in a certificate proceeding was sustained by this Court in *Callery*. Prior to this Court's decision in *Callery*, the producers continued to tender such cost and economic evidence as offers of proof which the Commission uniformly rejected. Such evidence was tendered in the *Amerada, Sinclair,* and *Hawkins* cases in the Commission.

B. The Cumulative Effect of the Exclusion of Evidence Advocated By Intervenors

Even more important than the procedural devices engaged in by Intervenors is the cumulative effect of the application of exclusion of evidence rules which the Intervenors seek to apply. In addition to excluding all cost and economic evidence sought to be introduced by the producers, Intervenors now seek to exclude from Commission consideration in its price line determination, all contract prices above their arbitrarily-selected level of 14-15 cents. Various reasons were given for excluding the higher prices from consideration in determining the price line as follows:

Intervenors' Exclusion No. 1

Intervenors allege that contract prices are in themselves entitled to no consideration because they are a "product of the unregulated market place" and until they have been approved by the Commission are en-

[47] 28 FPC 401, *supra*, pp. 9-10.

titled to no weight. Failure of the Commission to follow this exclusion completely (the Commission considered contract prices to show "economic trends in the area,") (III R. 7295; IV R. 4180) was one ground for remand by the Court of Appeals (IV R. 4306).

Intervenors' Exclusion No. 2

Intervenors assert that temporarily certificated prices are entitled to no weight, even though price reducing conditions were imposed, in some instances, refund conditions imposed in other instances, and moratoria against rate increase filings under Section 4 of the Natural Gas Act imposed in other instances, because they were not arrived at after contested proceedings in which Intervenors could participate. Intervenors completely ignore the reason for the existence of temporary certificates. Temporary certificates are applied for by producers, and granted by the Commission, because of emergency conditions, such as drainage of gas, payment of shut-in royalties, possible loss of leases, etc., which require the delivery of gas before the completion of the lengthy contested certificate proceedings.[48]

Intervenors further ignore that but for their own interventions, permanent certificates would have been issued in uncontested proceedings in most instances, making the temporary certificate procedure unnecessary. They also ignore the fact that the price levels fixed in the temporary certificates were arrived at after mature consideration and issuance of the Policy Statement. Failure of the Commission completely to exclude

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[48] The Commission's discretion to issue such temporary certificates was upheld by the D.C. Circuit in Public Service Commission of New York v. F.P.C., 327 F.2d 893 (D.C. Cir. 1964), and this Court in F.P.C. v. Hunt, 376 U.S. 515 (1964).

temporarily authorized prices, although giving them less weight than permanent certificates (III R. 7295-97; IV R. 4179-80) was one ground for remand by the Court of Appeals (IV R. 4307-13).

Intervenors' Exclusion No. 3

Intervenors contend that the Commission cannot consider any prices in other dockets in this certificate proceeding which it has consolidated with a particular producer's docket because all of these prices are being contested in the same proceeding by the Intervenors. In view of the Commission's practice of consolidating all contested certificate proceedings in a given pricing area into one case, this exclusion would effectively eliminate from consideration of the price line any price which Intervenors elect to contest, because these contracts are all consolidated in the same case. Intervenors ignore the fact that the producers have no control whatever over what the Commission consolidates, and have unsuccessfully objected to the consolidation of their dockets with others on the grounds that additional regulatory expenses are imposed upon them by the consolidation.

Intervenors' Exclusion No. 4

Intervenors would preclude consideration of any prices which are being contested by Intervenors at the Court level, in determining the price line, because such prices are "suspect". This reasoning has been sustained by the D.C., Fifth, and Ninth Circuits, and by this Court in *Callery*.

Intervenors' Exclusion No. 5

Under Intervenors' theory, even many permanently certificated prices, which are no longer subject to re-

view, which are above Intervenors' predetermined level, should be excluded for one reason or another. Prices permanently certificated by the Commission in an earlier proceeding[49] (in which Intervenors participated) in this area, because they represented sales to a new pipeline not yet in operation, and therefore may have resulted in higher prices than sales to an established pipeline. This reasoning was accepted by the Commission in *Skelly, supra,* and affirmed by the D.C. Circuit in *Public Service Commission of New York* v. *F.P.C.*[50] It was followed by the Commission in both *Hawkins* (III R. 7299-300) and *Sinclair.*

Intervenors' Exclusion No. 6

Intervenors would exclude other certificated prices on a different theory. Any contract prices, *even permanently certificated prices,* not subject to review, should not be used in determining the price line if they were at the same level as other prices in the same area still being contested by Intervenors *in other cases.* This reasoning was accepted as a part of the "suspect" doctrine by the D. C. Circuit[51] and the Ninth Circuit.[52]

Intervenors' Exclusion No. 7

Still a third class of permanent certificates are sought to be excluded because they were "tainted" by being

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[49] Houston Texas Gas & Oil Corp. and Coastal Transmission Corp., 16 FPC 118, (1956), affirmed, Florida Economic Advisory Council v. F.P.C., 251 F.2d 643 (D.C. Cir. 1958) *cert.* denied, 356 U.S. 959 (1958).

[50] 329 F.2d 242 at p. 246 (D.C. Cir. 1964).

[51] Atlantic Refining Co. v. F.P.C., 316 F.2d 677, 680 (D.C. Cir. 1963).

[52] United Gas Improvement Co. v. F.P.C., 283 F.2d 817, 824-825, (9th Cir. 1960), *cert.* den., *sub. nom.*, Superior Oil Co. v. United Gas Improvement Co., 365 U.S. 879 (1961).

certificated prior to this Court's decision in CATCO and consequently should not be considered by the Commission. This reasoning was rejected by the Ninth Circuit [53] and the Court of Appeals here (IV R. 4315).

Intervenors' Exclusion No. 8

Even after all of the prices listed above are excluded, Intervenors still contend that the highest prices in the area should not be used to represent the line, but rather the weighted average of "non-suspect" prices should be used. This reasoning was accepted by the Commission, and the Commission's discretion sustained by the decision below, the Tenth Circuit's *Sunray* decision consolidated herewith, as well as other Circuit Court cases.[54]

It will be seen from the foregoing discussion that the Intervenors have been almost universally sustained, either by the Commission or the Courts,[55] in their efforts narrowly to limit the evidence which the Commission can consider in exercising its jurisdiction under Section 7 of the Natural Gas Act. It is not the purpose of the Petitioners here to ask the Court to overrule any of the prior decisions limiting the Commission's jurisdiction or sustaining the Commission in its self-imposed limitations of evidence. It is Petitoner's purpose to ask this Court to consider the cumulative effect of these limitations on the evidentiary presentations, and the prices permitted to be consid-

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[53] *Id.*, at pp. 823-824.

[54] Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967); Pan American Petroleum Corp. v. F.P.C., 376 F.2d 161 (10th Cir. 1967).

[55] Provided that the Court of Appeals decision is not overruled in this case; except for exclusion No. 7, cited above.

ered in establishing the price line. In all three of the cases below, *Amerada, Hawkins,* and *Sinclair,* the Commission clearly recognized that if all of the exclusionary rules urged on them by the Intervenors, were applied, *substantially all of the "contemporaneous" prices which this Court in Callery directed to be considered would be eliminated.*[56] All that would be left to form the price line would be small volume sales at isolated locations sold at lower prices, which Intervenors had elected not to contest. Faced with this alternative, the Commission decided, we think correctly, to give "some" weight to contract prices (III R. 7295; IV R. 4180) and temporarily certificated prices, although giving them "less weight" than permanently certificated prices (III R. 7295-6; IV R. 4181). The Commission's discretion to make this decision, rather than giving strict effect to the rigid exclusionary rules urged by Intervenors, has been sustained by the Tenth,[57] the Fifth,[58] and the Ninth Circuits.[59] The conflicting decision of the D.C. Circuit below, which required rigid application of the exclusionary rules, *even where the result is to exclude substantially all contracts entered into under contemporaneous conditions,* should be reversed by this Court. If it is not, then the Commission's administrative function of determining the public convenience and necessity is reduced to the mere chore of stamping approval on only such applications as Intervenors, and others similarly inclined, so dictate.

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[56] 382 U.S. 223, 227.

[57] Sunray DX Oil Co. v. F.P.C., 370 F.2d 181 (10th Cir. 1966) (I R. 6696-6757) consolidated herewith I R. 6782-6; Pan American Petroleum Corp. v. F.P.C., 376 F.2d 161 (10th Cir. 1967).

[58] Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967).

[59] California v. F.P.C., 353 F.2d 16 (9th Cir. 1965).

It is apparent from a reading of the decision below that the D.C. Circuit did not appreciate the full effect of its decision on the Commission and the producers subject to regulation. The Court of Appeals said (IV R. 4314):

> "We do not hold that the FPC can never raise the price line on the interim period. We hold only that the Commission had advanced no reason why an escalation is justified in this case."

But if the rigid exclusionary rules of the Court of Appeals are sustained, how can the price line *ever* be changed by the Commisison in a Section 7 case? Under the Court of Appeals decision, contract prices cannot be considered (IV R. 4306). Current conditions cannot be considered unless there "is something special about them" (IV R. 4314).[60] Cost and economic evidence is excluded under *Callery*. The Commission's Statement of General Policy and its stabilizing effect on prices negotiated thereafter cannot be considered (III R. 4307-09). In short, as the Commission pointed out in each of its decisions[61] the strict evidentiary exclusions sought by Intervenors inevitably result in a price "freeze" in all areas of the United States during the interim period before just and reasonable rates are

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[60] The record reflects every conceivable showing of "something special" that can be made by a producer to prove that his contract should be entitled to a price above the in-line price. Examples include: (1) the furnishing of unusual compression and gathering facilities by the producer (III R. 462-63), (2) higher prices under comparable contracts previously permanently certificated by the Commission in the same field (III R. 323-4; 343; 350-51; IV R. 3923-5), (3) higher prices under comparable contracts in the intrastate market (III R. 316-19; IV R. 124-33; 163-65).

[61] *Amerada*, I R. 5785; *Hawkins*, III R. 7296; *Sinclair*, IV R. 4180.

determined. Both the Tenth Circuit[62] and the Fifth Circuit[63] agreed with the Commission that the application of the rigid exclusionary rules sought by the Intervenors would result in a price freeze. Nor do we understand the Court of Appeals to disagree, at least insofar as Section 7 proceedings are concerned (IV R. 4314).

The conclusion of the Tenth Circuit in *Sunray* is set out in the following language (I R. 6722):[64]

> "An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the 'unreviewable fiat' of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates."

The Court of Appeals, however, while pointing out that rates could be changed in proceedings under Section 4 of the Natural Gas Act, either through the collection of a rate increase subject to refund[65] or by the

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[62] Sunray DX Oil Co. v. F.P.C., 370 F.2d 181 (10th Cir. 1966), Case Nos. 60, *et al.*, consolidated herewith.

[63] Continental Oil Co. v. F.P.C., 378 F.2d 510 (5th Cir. 1967), application for certiorari pending, Austral Oil Co. v. F.P.C., *et al.*, Case Nos. 504, *et al.*

[64] The Tenth Circuit later reaffirmed its decision in Pan American Petroleum Corp. v. F.P.C., 376 F.2d 161 (10th Cir. 1967), application for certiorari pending; F.P.C. v. Pan American Petroleum Corp., *et al.*, Case Nos. 227, *et al.*

[65] See pp. 38-41, *infra*, where we discuss why the right to file for rate increases under Section 4 does not relieve the producer from the "price freeze" as suggested by the court below.

Commission after an area rate proceeding, conceded that its decision resulted in a price freeze insofar as any proceeding under Section 7 was concerned. The Court said (IV R. 4314):

> "It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing."

In the *Continental* case, the Fifth Circuit had before it the same arguments made by the same parties based on substantially the same type of record. The Fifth Circuit also had before it the Tenth and the District of Columbia Circuit decisions here under review, when it wrote its decision. Recognizing the clear conflict between the two decisions, the Fifth Circuit said (378 F.2d 525-526):

> "We are quite aware that the District of Columbia Circuit, in Public Service Commission of the State of New York v. Federal Power Commission 373 F.2d 816 [Feb. 7, 1967] refused to accept the reasoning of the Tenth Circuit in *Sunray DX*. To the contrary, adopting the Distributors' contention here made the District of Columbia Circuit did freeze the in-line price during the interim period between the sale of gas and the rate determination under § 4 or § 5 of the Act on the logic of *CATCO*. As we stated at the outset, we align ourselves with the Tenth Circuit's *Sunray DX* and the Ninth Circuit's holding that '* * * the "line" referred to in Catco may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce * * *' *UGI* v. *Federal Power Commission*, 9 Cir. 1960, 283 F.2d 817."

II. NEITHER THIS COURT'S DECISIONS IN CATCO AND CALLERY, NOR THE CIRCUIT COURT DECISIONS INTERPRETING THEM, REQUIRE A PRICE "FREEZE" UNTIL THE DETERMINATION OF A JUST AND REASONABLE RATE UNDER SECTIONS 4 AND 5.

A. CATCO Does Not Require a Price "Freeze"

The underlying rationale of the decision of the Court of Appeals, as well as the effect of that decision, is that a price "freeze" is "required by the logic of CATCO and in-line pricing." We agree that the rigid exclusionary rules applied by the Court of Appeals would have that result. We deny that such a result is required by the "logic of CATCO." In fact, the "exclusion of all evidence" rules announced by the Court of Appeals are in specific conflict with this Court's CATCO decision. This Court said (360 U.S. 378 at 391):

> "* * * What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to the initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to the 'present or future public convenience and necessity' before permanent certificates are issued."

This Court held (360 U.S. at 392):

> "Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates."

How can there be sufficient evidence to support a finding of public convenience and necessity if the Commission is required by the Court to exclude all evidence?

How can the Commission give "careful scrutiny" or "responsible reaction" when it is foreclosed from considering any evidence as to price except that which any Intervenor may choose not to contest?

Furthermore, this Court carefully made clear that it was *upholding the Commission's discretion* to impose price conditions, not *directing* the Commission to impose conditions as to price, as the Court of Appeals would do.[66] In the words of the Court, so often quoted (360 U.S. 391):

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, *the Commission in the exercise of its discretion might attach such conditions as it believes necessary.*"

The Commission *did* exercise its discretion here, and *did* attach price conditions which it believed to be necessary in keeping with the public interest. The Commission's decisions are based on substantial evidence.[67] CATCO has been complied with.

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[66] We recognize that the D.C. Circuit decision does not direct the Commission to condition the producers' prices to 15 cents in so many words. But that is the inevitable effect of the decision, as discussed in Section I, *supra*, pp. 19-30.

[67] See Section III, *infra*, pp. 42-53.

B. This Court's Callery Decision Does Not Support the Court of Appeals

Neither the Commission nor this Court in *Callery*[68] was faced with a situation comparable to that reflected on the record in the cases involved here. In *Callery*, the Commission was able to find prices at levels "where substantial amounts of gas have been certificated to enter the market under contemporaneous certificates" without using prices which were "in any way suspect." Therefore, neither the Commission nor the Court was called upon to decide what to do in a situation where the strict application of the "suspect" rule as advocated by Intervenors would result in the exclusion of substantially all of the volumes of gas under "contemporaneous certificates." In the areas involved here, there are no prices approved in a contested hearing under contemporaneous certificates, for the reason that the Commission has consolidated all of these producer certificate applications into the cases here under review.

Under these circumstances, how can the price line be determined? In our view, absent an abuse of discretion, the Court should leave this determination to the Commission, permitting it to consider such evidence of "current conditions," including temporary certificates, contract prices, competing intrastate market evidence, and any other evidence which the Commission deems relevant to determine the "present and future public convenience and necessity" of the prices in question. The suspect price doctrine should not be extended to eliminate all, or substantially all, of the

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[68] United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965).

evidence which the Commission can consider, resulting in a price "freeze," or a "rollback to prices having no current relevancy." [69]

C. The In-Line Price Must Reflect Current Conditions

All of the cases expounding the in-line pricing theory emphasize the requirement that the price line reflect "current conditions." These decisions clearly require the Commission continually to re-evaluate the conditions in the industry, emphasizing the *time* at which the sale takes place as an important element in determining whether a particular price should be used in determining the price line. This Court's reference to "*contemporaneous* certificates" and "*existing* levels" in *Callery* (382 U.S. at 227) constitutes recognition and approval of the importance of this factor as noted in prior Circuit Court opinions.

In the *UGI* case,[70] the Ninth Circuit rejected a contention by UGI and the New York Commission that the price line must be the same as the pre-CATCO line stating (283 F.2d at 823, 824):

> "As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in fact,

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[69] United Gas Improvement Co. v. F.P.C., 283 F.2d 817, 824 (9th Cir. 1960).

[70] United Gas Improvement Company v. F.P.C., 283 F.2d 817 (9th Cir. 1960).

require a rollback to prices having no current relevancy."

In *Sohio Petroleum Co.* v. *F.P.C.* the Tenth Circuit stated [298 F.2d 465, at 467 (10th Cir., 1961)]:

> "* * * the Commission had both the right and duty to re-examine and determine the reasonableness of the in-line price to assure that such price continually served the public interest * * *.
>
> "The purpose of establishing an in line price is of course the stability accorded producer, buyer and the public in balance with the respective interests of each. Permanence is dependent upon the maintenance of such balance and the duty to guard, review, *and, if necessary, change* the in line price, rests with the Commission.

In its prior decisions, the District of Columbia Circuit has also recognized the time factor in determining the in-line price. In *Atlantic Refining Co.* v. *F.P.C.*,[71] the Court stated [316 F.2d 677, at 680 (D.C. Cir. 1963)]:

> "As used in CATCO, the line means the price at which similar sales, not suspect, were made under similar circumstances from the same area *about the same time.*"

Also in *Public Service Commission of New York* v. *F.P.C.* the District of Columbia Circuit stated [329 F.2d 242 at 247 (D.C. Cir. 1964)]:

> "We think we must honor the discretion thus exercised by the Commission 'to require that the gas

[71] In this case the District of Columbia Circuit affirmed the Commission's decision that the price line in North Louisiana had changed over a 17-month period from 16.5 cents to 17.0 cents as of May 1, 1959, based upon consideration of contract prices and temporarily-certificated prices.

> sold be sold under contracts that were *in line as of the time they were executed'*, to adopt its language."

In *Continental Oil Co.* v. *F.P.C.* the Fifth Circuit expressly aligned itself with the holdings of the Ninth Circuit and the Tenth Circuit that the requirement to consider "current conditions" precludes a price "freeze" in a Section 7 proceeding.[72]

D. The Inevitable Result of the Decision Below Is to Deprive Producers of the Hearing Required By Section 7(c) of the Natural Gas Act

If the decision of the Court of Appeals is affirmed, the inevitable result is to reduce the hearing required under Section 7 of the Natural Gas Act to a meaningless formality. As interventions will be filed in all certificate proceedings where the initial price exceeds the previously determined line the price line determination will inevitably be the same.[73] Thus the requirement of the Act for a hearing, and the directions of this Court in *CATCO* and *Hunt* that price be considered in a certificate case will be effectively circumvented. The power to condition the contract prices to a determined "in-line" price necessarily includes the power to change that price as the public interest may require.[74]

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[72] 378 F.2d 510, at 524-525 (5th Cir. 1967).

[73] Conceivably, if the reasoning of the Court of Appeals were adopted, the Intervenors could decide to force the price line down, by intervening in all sales above some lower level.

[74] Sohio Petroleum Co. v. F.P.C., 298 F.2d 465 (10th Cir. 1961).

E. A Price Freeze for the "Interim" Period Before the Establishment of a Just and Reasonable Rate Is Not in the Public Interest

In a certificate proceeding the Commission is empowered to consider all factors which it deems relevant to the present or future public convenience or necessity. Broad though not unfettered discretion is vested in the Commission in this respect, and the courts should not substitute their judgment for that of the Commission, absent a clear abuse of discretion. It is not an abuse of administrative discretion for the Commission to determine, as it has here, that a price freeze is neither required by precedent nor consistent with the public interest. Because of the insistence of Intervenors that a price freeze is required, however, we believe it necessary to point to several facts in the record which support the Commission's decision.

The record reflects that although the price line has been "held" in the Texas Gulf Coast Area, and in fact, has been rolled back from the 20-cent level found necessary in 1959,[75] and the 18-cent guideline level announced by the Commission in 1960, this price "stability" has been accompanied by steadily decreasing volumes of gas sold in interstate commerce since that time (III R. 1491, 1364). The consumer has attained price "stability" at the sacrifice of the incentive required to maintain adequate supplies. It is of little comfort to the consumer that the price is frozen at 15 cents (or

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[75] In Trunkline Gas Co., 21 FPC 704, the Commission found that in 1959 a 20 cent per Mcf price was necessary to bring the gas involved in that case into the interstate market, instead of being sold for intrastate uses and issued a permanent certificate without price conditions.

any other level), if adequate gas supplies cannot be purchased at that price. Because of the long delay attendant to proceedings under Section 4 and 5 to determine a just and reasonable rate,[76] the Commission should and does have discretion to change the price line if changing current conditions require that to maintain adequate supplies, without waiting for the conclusion of a ponderous rate case.[77]

F. Relief From the Price "Freeze" Is Not Afforded by the Right of the Producer To File for a Rate Increase Under Section 4 of the Natural Gas Act

The Court of Appeals was of the view that a price "freeze" would not result under its decision because if the producer was dissatisfied with the in-line price he could file for a rate increase under Section 4 of the Act (IV R. 4314). The Court was in error for the following reasons:

1. The Court of Appeals failed to consider the effective, and for the producer unavoidable, freeze in his price which occurs while the certificate case is pend-

[76] Noted by the Court in *Second Phillips, CATCO, Callery, Hunt* and other cases. In his dissenting opinion in *Sunray,* Judge Seth noted the importance of the in-line determination because of the delays in Section 5 proceedings (I R. 6755-56).

[77] Although all cost and economic evidence was excluded from this record by the Commission under the *Skelly* rule, evidence filed in the Texas Gulf Coast Area Rate Proceeding indicates that "current conditions" have indeed changed and even the in-line rate fixed by the Commission is too low. The cost witness sponsored by the distributor-intervenors (the same parties as Intervenors here, except for the New York Commission) testified in that case that the cost of "new" gas was 16.45 cents per Mcf, and the rate design witness for these same distributors recommends a "new" gas rate of 16.25 cents for Railroad District No. 4, 16.75 cents for Railroad District No. 2 and 17.25 cents for Railroad District No. 3.

ing, either before the Commission, or before the Court of Appeals. During this period, the producer is usually forced by economic pressures to commence delivery of his gas under a temporary certificate issued by the Commission. The Commission customarily imposes a condition that no rate increases under Section 4 can be filed until a permanent certificate is issued. This type of condition was considered by this Court in *Hunt*.[78] The Court considered the conflict between the right of the producer to file for a rate increase under Section 4 and the power of the Commission to impose certificate conditions under Section 7, and held that the Commission had the power to prohibit rate increase filings until the permanent certificate is issued. The Court noted that the delay in obtaining permanent certificates where such conditions were imposed worked against the producer, and that the consumer would be adversely affected by the reluctance of the producer to incur this delay.[79] As any contract price which exceeded the price line would require a contested proceeding before a permanent certificate could issue, the producer's price would be effectively "frozen" by the Commission's practice of imposing in the temporary certificate (1) a price condition reducing the delivered rate down to the in-line price and (2) a prohibition against any rate increase filings while the certificate proceeding was pending.

2. Nor would Section 4 of the Act provide relief from the price "freeze" even after the permanent certificate is issued. After the contested certificate pro-

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[78] 376 U.S. 515 (1964).

[79] *Id.*, at 527.

ceeding is finally completed and a price condition imposed by the Commission reducing the contract price to the in-line price, the producer is first faced with the five-month waiting period prescribed by the Act before the increase can be placed into effect. After this period has expired, there is another obstacle imposed by the Commission. The Commission now imposes a moratorium on rate increase filings above a second arbitrary level, slightly higher than the in-line price, as a condition in the permanent certificate.[80] This Court sustained this moratorium on rate increase filings in *Callery*, as a valid exercise of the Commission's expertise.[81]

Again we emphasize that it is not our purpose here to seek reversal of the power of the Commission to impose conditions in either temporary or permanent certificates which eliminates or reduce the producer's right to file for a rate increase under Section 4, which this Court has sustained in *Hunt* and *Callery*. Rather we are pointing out that the existence of this conditioning power in the Commission, coupled with its active exercise of this power by the Commission in an almost universal fashion, prevents the use of Section 4 to break the price "freeze" in the manner contemplated by the Court of Appeals.

There is yet another reason why the right to file for rate increases under Section 4, to the extent it is not

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[80] The Commission imposes such moratorium as a matter of general practice, as evidenced by the Commission's rulemaking Order No. 296 issued April 5, 1965; 33 FPC 682, 18 CFR 2.56. For Texas Railroad Commission District No. 2 and 4, this level is 18 cents (I R. 5795; IV R. 4191) and for District No. 3 it is 19 cents per Mcf (III R. 7302).

[81] 382 U.S. 223 at 229 (1965).

proscribed by the Commission through certificate conditions, is not a satisfactory solution for the producer. The producer has no way of knowing what part of his rate he will ultimately be entitled to keep when the area rate proceeding is finally completed. This uncertainty interferes with obtaining the necessary finances to continue exploratory operations, subjects the producer to possible overpayments of taxes and royalty obligations, and acts as a strong deterrent against engaging in gas exploration at all.[82] This deterrent effect is making itself felt through declining exploratory activity, with a resultant decline in supply relative to demand. The adverse effect on the consumer of this situation was recognized by this Court in *Hunt*[83] and *Callery*.[84] This factor entered into the Commission's discretionary decision that a higher in-line price in the Texas Gulf Coast Area was required in the 1960's, above that in existence in the 1950's.[85]

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[82] These factors prevent the filing of rate increases from being "the answer" to the price freeze, according to the Fifth Circuit in Continental Oil Co. v. F.P.C., 378 F.2d 510, 525 (5th Cir. 1967).

[83] The price tabulations in the Commission's *Hawkins* opinion (III R. 7294-5) show a decline in permanently certificated first month's volumes in District No. 3 from 2,666,016 Mcf for the 33 month period ending 9/27/60, to 1,128,755 Mcf for the 39 month period ending 12/31/63. See also Charts reproduced as Appendices C and D of this brief (III R. 1491; IV R. 760-61).

[84] 376 U.S. at p. 527.

[85] 382 U.S. at p. 227.

III. THE COMMISSION'S DETERMINATION OF THE PRICE LINE FOR THE PERIOD AFTER SEPTEMBER 28, 1960, IS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS A PROPER EXERCISE OF COMMISSION DISCRETION AND SHOULD BE SUSTAINED

A. The "Substantial Evidence" Rule Is Applicable to Decisions of the Federal Power Commission

It is a fundamental principle that the decision of the agency must be sustained if the record which formed the basis for its decision contains "substantial evidence" supporting the Commission's decision; *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, at 602 (1944); *Illinois Central Railroad Co.* v. *Norfolk and Western Railway Co.*, 385 U.S. 57 (1966); 17 L.ed. 2d 162 at 169; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, at 271 (1926); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

Section 19 (b) of the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717(r)(b) provides in part that:

> "... The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

B. The Commission Has Broad Discretionary Power in Certificate Proceedings Under Section 7.

In CATCO, the genesis of the "in-line" price theory, this Court clearly set out the discretionary power of the Commission to impose price conditions.[86] The discretionary power of the Commission was again emphasized by this Court in *F.P.C.* v. *Hunt* where the Court stated [376 U.S. 515, at 526 (1964)]:

> "*The existence of broad discretionary power* in the Commission to condition temporary certificates appears to us to be vital to its ability to hold the line in pricing."

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[86] See quotation from 360 U.S. at 391, supra, p. 32.

In the *Hunt* case the Supreme Court dealt with temporary certificates. This Court's reliance on Commission expertise in determining the "in-line" price was extended to permanent certificates in *Callery*. The Court stated [382 U.S. 223, at 229 (1965)]:

> "The 'in line' price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not 'suspect,' and the selection of 23.55 cents beyond which a price increase might trigger escalation reflects the Commission's *expertise*." (Emphasis by the Court)

One of the leading certificate decisions following this Court's CATCO decision was written by the Ninth Circuit in *United Gas Improvement Co.* v. *F.P.C.*, 283 F.2d 817 (9th Cir. 1960). In that case the Ninth Circuit reversed the Commission for failure to follow the "logic of CATCO." Recently, the Ninth Circuit had occasion to consider the Commission's approach to certificate cases under the in-line method, in *California* v. *F.P.C.*[87] on an appeal by distributors and the California Public Utilities Commission who had contended that the Commission had based its decision on prices which were "suspect." After a thorough review of all of the in-line cases, the Ninth Circuit stated (353 F.2d at p. 22):

> "Considerable water has gone over the dam since that time, and the Commission is now, as evidenced by the opinions of the Commission in this case, fully aware of the duty that Catco imposes on it to protect the consumer. Its actions in other matters evidence the same awareness. (General Policy Statement No. 61-1, Sec. 2.56, 18 C.F.R. 2.56, amended 26 F.P.C. 661 (1961), 28 F.P.C.

[87] 353 F.2d 16 (9th Cir. 1965).

441 (1962), 29 F.P.C. 590 (1963), 30 F.P.C. 1435 (1963); FPC Annual Report, 1964, p. 106). [Footnote omitted.] As the Commission states in its brief, after several years of its intensive efforts the national average price for gas levelled off, see FPC Ann. Rep., 1964, at 106, and even appears to have declined, see U.S. Dep't of Labor Wholesale Prices and Price Indexes, B.L.S. Commodity Code No. 0531-01.03, FPC Form No. 2. We think, then, that in view of the many 'in line pricing' cases that the Commission had decided, and of the attitude that it has shown in deciding them, we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."

With specific reference to the discretion of the Commission to consider "suspect" prices, the Ninth Circuit said in *California* v. *F.P.C.* [353 F.2d 16, at p. 23 (9th Cir. 1965)]:[88]

> "No doubt there are many certificated prices—some under unconditioned certificates and others (like the Aneth price) conditioned, some established in contested proceedings and others not contested—which might be different, and lower, if the Commission were passing on them under section 7 today. But this, we think, does not *require,* although it may *permit,* the Commission to disregard them or to give little weight to them in deciding what is an appropriate price line to which to refer." (Emphasis by the Court)

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[88] The Ninth Circuit recently reaffirmed its faith in the Commission's expertise in California Gas Producers Association v. F.P.C., Case No. 21310, — F.2d —, decided September 15, 1967, citing the quoted language.

Even the District of Columbia Circuit has, in past cases,[89] emphasized the discretionary power of the Commission.

C. The Record Contains Substantial Evidence Which Supports the Commission's Determination of the In-Line Price

1. The Evidence in the Hawkins Record Sustaining the 17-Cent Price Line for Post-Policy Statement Sales in District No. 3.

a. Evidence of "Current Conditions"

Three producer witnesses testified on the in-line price in Railroad District No. 3. Mr. Robert L. Norris found the in-line price to be 17.5081 cents, based on a weighted average of contract prices of actual volumes of gas delivered in interstate commerce in 1962 (III R. 1569, 698, 6781). Mr. H. L. McDonald testified on behalf of Pan American Petroleum Corporation that the weighted average price received by Pan American in Railroad District No. 3 for all of its intrastate contracts executed since January 1, 1959, was 19.329 cents (III R. 319) and that the interstate price would have to be at least that high to be competitive (III R. 321-327).

Mrs. Celia Gody testified that based on a complete study of contract prices (summarized by a chart at II R. 1500, 1364) the in-line price level would be 18¢

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[89] In Public Service Commission of New York v. F.P.C., 329 F.2d 242, at 247 (D.C. Cir. 1964), the D.C. Circuit said:

> "We think we must honor the discretion thus exercised by the Commission * * *."

In Oklahoma Natural Gas Co. v. F.P.C., 257 F.2d 634, at p. 639 (D.C. Cir. 1958), the D.C. Circuit said:

> "The granting or denial of a certificate of public convenience or necessity is a matter peculiarly within the discretion of the Commission."

per Mcf.[90] Mrs. Gody also showed a sharp decline in gas committed to interstate commerce from Railroad District No. 3, from 33.0 billion cubic feet in 1958 to 2.7 billion cubic feet in 1963,[91] which she attributed to the fact that the "guideline" prices fixed by the Commission were not competitive with the intrastate market in this area (III R. 222-224). All of this evidence supports the Commission's finding that "current conditions" require an in-line price of at least 17¢ per Mcf.

b. Permanently-Certificated Sales

The Staff Economist, Russell T. Jones, prepared exhaustive contract analyses of all contracts in District No. 3 from June 7, 1954 to December 21, 1963 (III R. 1414-1453, 928), using only *permanently* certificated sales (III R. 839-840), expressly excluding temporarily certificated sales and giving no effect to uncertificated contract prices (III R. 839-847; III R. 868-9). A summary chart of Mr. Jones' price exhibit[92] discloses that even under this restrictive consideration, 29.45% of the *permanently certificated* volumes sold in interstate commerce from District No. 3, sold under contracts dated between September 28, 1960, and December 31, 1963, were at a price of 18¢ per Mcf. The Commission placed primary reliance on Mr. Jones' exhibit, but found that he had erred in including sales to Valley Gas Transmission Company at 14¢. The Commission had found in *Amerada* (I R. 5787) and it reiterated in

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[90] III R. 234—Gody's Exhibits received in evidence at III R. 1364.

[91] III R. 1491—reproduced as Appendix C of this Brief.

[92] III R. 1453; received in evidence, III R. 928; reproduced as Appendix E to this Brief.

Hawkins (III R. 7294) that because Valley was a gathering company, purchasing gas in small quantities at isolated locations at prices less than the rate acceptable to major interstate pipelines, sales to Valley should not be utilized in determining the price line. On eliminating these sales from Mr. Jones' exhibit, the recomputed table shows that 42.62 per cent of the volumes sold under permanent certificates under contracts dated between September 28, 1960, and December 31, 1963, were at 18 cents.[93] Based on this evidence the Commission concluded (III R. 7297):

> "We are of the opinion that 17.0 cents per Mcf at 14.65 psia is the in-line price for the period following September 28, 1960. It is our judgment that this conclusion gives appropriate weight to the comparatively large volumes sold under permanent certificates at 18.0 cents per Mcf while reflecting the weighted average price of 16.17 cents per Mcf. In addition, a 17.0 cent price clearly gives some weight to the unconditioned contract prices and to the prices under temporary certificates. Finally, some 43 percent of the gas has been permanently certificated at a price higher than 17.0 cents. One proposed sale, Humble to Natural Gas Pipeline in Docket No. CI64-677 is at 17.0 cents, under a contract dated October 1, 1963. Giving due consideration to all sales in the area during the period in question, an in-line price of 17.0 cents is fully justified."

We submit that despite the Commission's language that the finding of the 17.0 cent price line "gives some weight to the unconditioned contract prices and the prices under temporary certificates," there is substan-

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[93] III R. 7294-5—Tabulation reproduced as Appendix D attached to this Brief.

tial evidence supporting the Commission's decision in *Hawkins, if only the permanently certificated* prices are considered. *Western Paper Makers' Chemical Company* v. *United States,* 271 U.S. 268, 271 (1926).

c. Temporarily-Certificated Sales

The Commission gave "some weight" to temporarily-certificated prices (III R. 7297), even though they were not regarded "as persuasive" (III R. 7295-96) as permanently-certificated prices, in determining the price line. Consideration of these prices was the primary reason for remand by the Court of Appeals which noted, however, that "recently, though, the FPC has attempted to make temporary certificates a more considered decision" (IV R. 4307).

It is clear that the Commission has the power, under this Court's decision in *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964) to consider the initial price when it issues a *temporary,* as well as when it issues a *permanent,* certificate. It is apparent on this record that the Commission *did, in fact,* consider the price issue before issuing the temporary certificates which it gave "some weight" in determining the price line. Price reducing conditions, refund conditions, and moratoria against rate increase filings, were imposed in various temporary certificates. Where a price reducing condition was imposed, it was this *reduced* price which the Commission considered.

In *American Liberty Oil Co.* v. *F.P.C.*[94] the Fifth Circuit upheld the imposition of a price condition in a temporary certificate, even though there was no hearing or substantive findings, holding that the price con-

[94] 301 F.2d 15 (5th Cir. 1962).

dition was subject to court review of its "reasonableness" and that in this case the Commission had acted within the bounds of its discretion.[95] Inclusion of temporarily-certificated prices in contracts for the 1958-1963 period resulted in a weighted average price of 18.05 cents (III R. 7296) which more than confirmed the Commission price line of 17 cents here in question.

d. The Effect of the Statement of General Policy

The Statement of General Policy No. 61-1, issued September 28, 1960, (24 FPC 818; 18 CFR § 2.56) has formed the keystone of the Commission's attempt to implement this Court's CATCO decision.[96] The Commission considered various factors set out in the Statement as follows (24 FPC 819):

> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas."

In *F.P.C.* v. *Texaco Inc.*, 377 U.S. 33 (1964), this Court sustained the power of the Commission to prescribe "such regulations as it may find necessary as appropriate to carry out the provisions of this Act."[97]

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[95] *Id.*, at 18-19.

[96] This Court noted the Commission's efforts in this regard in *Second Phillips*, 373 U.S. 294, at pp. 307-08 (1963), and *Hunt*, 376 U.S. 515 at pp. 518, 527 (1964).

[97] 377 U.S. at 41 (1964).

The Commission's action in promulgating guideline prices under the Statement of General Policy, has received the approval of the District of Columbia Circuit,[98] the Tenth Circuit [99] and the Ninth Circuit [100] and by this Court in *Callery, supra.*

In convening each of the proceedings here under review, the Commission expressly stated that it would consider the effect of its Statement of General Policy upon contracts dated after that date.[101] The producers introduced evidence showing that they relied on the guideline prices set out in the Policy Statement and in many cases voluntarily reduced their contract prices in the hope of obtaining certificates without protracted proceedings (*e.g.*, III R. 226).

As the "guideline price" was established *ex parte,* and not through a contested hearing, it was not the establishment of an in-line price, but was still a factor to be considered in the determination of what the in-line price should be.[102]

After contested hearings were conducted on the in-line prices in each of the Texas Railroad Districts here in question, the Commission amended its guide-

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[98] Public Service Commission of New York v. F.P.C., 329 F.2d 242, 247 (D.C. Cir. 1964).

[99] Sohio Petroleum Co. v. F.P.C., 298 F.2d 465, 467 (10th Cir. 1961); Pan American Petroleum Corp. v. F.P.C., 298 F.2d 478 (10th Cir. 1961).

[100] California v. F.P.C., 353 F.2d 16, 22 (9th Cir. 1965).

[101] District No. 4, 28 FPC 412; District No. 3, 29 FPC 599; District No. 2, 30 FPC 1442-49.

[102] Sunray DX Oil Co. v. F.P.C., 370 F.2d 181 (10th Cir. 1966) [I R. 6714; citing Public Service Commission of New York v. F.P.C., 329 F.2d 242, 247 (D.C. Cir. 1964)].

line price in this area, reducing that price from 18 cents to 17 cents in Railroad District No. 3;[103] from 18 cents to 16 cents in Railroad District No. 4;[104] and from 18 cents to 16 cents in Railroad District No. 2.[105] The Commission concluded that it was following this Court's CATCO decision. The Commission stated:

> "* * * our guiding purpose here is to arrive at a revised price which will enable the Commission to hold the line on new sales in this area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas." [106]

In discussing the theory of "in-line" pricing regulation the Tenth Circuit said:[107]

> "The extensive study of the Commission taken before the issuance of Statement 61-1 negatives any aspect of arbitrariness."

Through its Statement of General Policy and the in-line decisions following it, the Commission has sought to establish reasonable price stability without a price freeze in this area pending the determination of a just and reasonable rate. The producers have cooperated by voluntarily reducing their initial contract prices to conform to the Commission's guidelines. The

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[103] Sixth Amendment, 29 FPC 590 (1963).

[104] Fifth Amendment, 28 FPC 441 (1962).

[105] Eighth Amendment, 30 FPC 1435 (1963).

[106] Sixth Amendment, 29 FPC 590 (1963).

[107] Sohio Petroleum Co. v. F.P.C., 298 F.2d 465, 467 (10th Cir. 1961).

Intervenors are seeking to "rollback" these prices to the depressed levels of the previous decade (I R. 5785). Thus, it was clearly within the Commission's discretion to give some weight to its Policy Statement prices, and to the industry's reliance thereon, and its action in so doing should not be disturbed.

2. The Evidence in the Sinclair Record Sustaining the 16-Cent Price Line for Post-Policy Statement Sales in District No. 4

The *Sinclair* record contains the same type of evidence discussed above in connection with the *Hawkins* case. In *Sinclair* the Examiner found that 83.36 per cent of the gas moving in interstate commerce from District No. 2, contracted for subsequent to the Policy Statement, was being sold at prices above the 16 cent level (IV R. 3917-18) made up of 1,933,983 Mcf under permanent certificates and 2,456,514 Mcf under temporarily certificated sales (IV R. 761,605; 696,315; 4176). The numerically weighted average price for this period was 16.68 cents per Mcf, and the volumetrically weighted average price was 17.18 cents per Mcf (IV R. 3918).

These percentages were arrived at by the exclusion of prices below 14 cents by the Examiner. The Commission found that the Examiner had erred in excluding these sales (except for the sales to Valley Gas Transmission Company). But even including the sales below 14 cents, the Commission found that still approximately 53 per cent of the estimated first month's volumes moved in interstate commerce in the price range of 16 cents to 18 cents (IV R. 4181). Recognizing that the temporary certificates covered most of the sales in the 16-18 cent range, the Commission fixed

the in-line price at 16 cents. With reference to its decision to consider the temporary certificates, the Commission said (IV R. 4180):

> "The permanently certificated prices reflect only a part of the market activity in the post-policy period. Permanent certification is granted only where the proposed price is within the applicable guideline price, and where there is no contest by any intervenors. Thus to limit the consideration to permanent certificates would permit a price freeze and would render the hearing in this proceeding be meaningless. The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested."

The *Sinclair* record also contains evidence of the expanding intrastate market (IV R. 697-98) contrasted with a declining interstate market (IV R. 695-96).

IV. THE COURT OF APPEALS ERRED IN DECLARING THAT THE COMMISSION MUST DETERMINE PUBLIC AND PIPELINE NEED FOR GAS IN PRODUCER CERTIFICATE PROCEEDINGS

Although the Intervenors narrowly restricted the need issue to the possible effect upon the pipeline purchasers of take-or-pay provisions in producer contracts, the Court of Appeals held that questions of pipeline and public need must be determined in producer certificate cases. In so holding, the Court of Appeals not only exceeded the issue raised by the parties, but also substituted its judgment for that of the Commission as to the most appropriate proceeding for determining such need. In our view the Commission did not abuse its discretion in considering the question of public "need" for the gas in pipeline certificate proceedings, and considering the impact of take-or-pay provisions

in a separate rule-making proceeding.[108] Absent such an abuse of discretion, the Commission should have been affirmed.

At the pretrial conferences before the Commission where the issues to be litigated are defined,[109] counsel for Intervenors carefully limited the scope of the need issue which he was raising. Thus, he stated in the *Hawkins* case (III R. 56-57):

> "I think in the broadest gauge need would require a showing that it is needed by the consumers to whom this gas will ultimately flow. That is not what I had in mind. What I had in mind was a more limited showing of need, to wit: That the four purchasing pipelines here involved can take this gas without placing themselves in a take or pay situation, without aggravating an existing take or pay situation, and without cutting back on any lower priced gas in order to take it.
>
> "In other words, the concept of need that I am insisting on here is not what I would call the very broad need matter, but solely a showing that the pipelines here have a need when measured against their take or pay obligations in their existing contracts."

In the *Sinclair* case, even this restricted need issue was not raised during the pretrial conference or at the hearing (IV R. 10-11, 17, 3701, 4185).

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[108] Docket No. R-199, Order No. 334, issued January 18, 1967, — FPC —, modified by Order No. 334-A, issued March 21, 1967, — FPC —. See Appendix F.

[109] See Section 1.18 of the Commission's Rules of Practice and Procedure, 18 CFR 1.18.

Notably, at no time was any question of waste of gas through inferior end-use by the pipelines' customers raised. Yet, the Court of Appeals held, *sua sponte* (IV R. 4297-4298):

> "One of the most important ways is to control and limit the end uses of gas. The FPC must compare various uses and determine which ones are more economically necessary. If the proposed sale is to a consumer who will use the gas in an economically 'inferior' way when the sale is not certificated. Of course, to do the job properly the FPC must consider *all* alternative uses. It recognizes this responsibility in pipeline certificate cases. But if it refuses to consider the issue in producer certificate cases and waits for pipeline cases, some of the alternatives will already have been eliminated. In the pipeline case the FPC can direct the gas towards one rather than another of the pipeline's customers but without considering the customers of other pipelines which might have bought the gas. Thus, the gas may go ultimately to consumers whose use will be less economically beneficial than the use of other potential purchasers.
>
> "Because the FPC refused to consider the issue of need, this record does not indicate whether or not this gas has been wasted. However, such wasting is a possible result of the alleged oversupply situation of some of the pipelines here. The possibility that gas may be wasted requires that the FPC determine the issue of need *before* the initial sale to a pipeline. Otherwise it may be too late to protect the public interest." [Footnotes omitted].

The lower court's holding contrasts with the Commission's practical determination of an immensely practical problem. Thus, in *Hawkins,* after noting that

the Intervenors had presented no evidence to support their contentions, the Commission held (III R. 7293):

> "We agree with the examiner that, because of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for future, even though the supplies may be slightly in excess of their present-day needs. The issue of public need should be confined to pipeline certificate proceedings, not producer applications."

In *Sinclair,* the Commission made clear the basis for its judgment that questions of public need should, more appropriately, have been raised in the pipeline certificate proceedings, declaring (IV R. 4185):

> "In many instances deliveries have been made under the contracts for several years. The New York Commission's evidence as to lack of need is not, in our judgment, persuasive. We find the exceptions of the New York Commission not appropriate in the present posture of this proceeding, particularly so, since such exceptions were raised after the certification of the pipeline purchasers had been authorized, and on the basis of a record which discloses no question as to need for the gas supply involved."

It is apparent that the Court of Appeals has substituted its judgment for the administrative discretion of the Commission to determine the manner in which it will dispose of its workload. The Commission, with its expert knowledge of the gas business and its own administrative expertise in processing pipeline and producer certificate proceedings, decided that the public and pipeline need issues, if any, should be determined

in the pipeline cases where those issues are directly relevant. The Commission's action was, of course, consonant with the broad scope afforded to administrative agencies to determine the manner and precedence in which they will process matters coming before them. *Cf., F.P.C.* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 155 (1962); Section 16 of the Natural Gas Act, 15 U.S.C. 717o. For example, the Commission customarily exercises its power to consolidate numerous producer applications for hearing despite possible adverse impact upon individual applicants. In the exercise of its administrative discretion, the Commission even postpones action upon rate cases despite the requirement in Section 4(e) of the Act that the Commission shall give preference to hearing and decision of rate increase proceedings over other questions pending before it.[110] And this Court has recently upheld the Commission's refusal to admit evidence in producer certificate cases where the effect would be to protract unduly the length of the proceedings. *United Gas Improvement Co.* v. *Callery Properties, Inc., supra.*

Moreover, the Commission's decision to determine the issues of pipeline need and the need of the ultimate consumers, including conservation questions, in pipeline cases dovetails with the nature of the gas business. The Commission noted that pipeline companies will occasionally encounter scheduling problems in their purchase of supplies under long-term contracts (III R. 7293). Its expert evaluation of this problem and its decision to tackle the pipeline and public need issues in pipeline proceedings, while affording adequate protection through conditions in the producer certificates,

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[110] Section 4(e), 15 U.S.C. § 717c(e).

contains the implicit recognition of the facts of life in pipeline operation.

Thus, ordinary business prudence requires a pipeline to schedule its purchases to meet the requirements of its customers, both in the short-run and for reasonable periods into the future. For market protection, the Commission normally requires that pipelines maintain a twelve-year deliverability life, that is, reserves must have sufficient deliverability to supply existing needs for at least twelve years.[111] In order to maintain reserves for protection of its markets, a pipeline may find it necessary to contract for the purchase of supplies greater than its immediate needs. This situation may arise, for example, when a particularly attractive gas reserve comes on the market. The pipeline must purchase the gas immediately or lose the entire reserve, and failure to add reserves as they become available inevitably would lead to a gas shortage for the pipelines' customers.[112]

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[111] See, Order No. 279, 31 FPC 750 (1964) where the Commission defined deliverability to represent:

> "* * * the number of future years during which a pipeline company can meet its annual requirements for its presently certificated delivery capacity from presently committed sources of supply. The availability of gas from these sources of supply shall be governed by the physical capabilities of these sources to deliver gas, by the terms of existing gas-purchase contracts and limitations imposed by state or federal regulatory agencies."

[112] F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, at 17 (1961):

> "In this connection, it must be realized that the Commission's powers under § 7 are, by definition, limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification."

Giving recognition to this aspect of the nature of the gas business, and also to the fact that producers cannot indefinitely postpone recoupment of their investments, gas sales contracts normally provide for deliveries over a twenty-year period. Customarily, these contracts also contain take-or-pay provisions, permitting the pipeline purchaser to postpone deliveries for periods ranging from a few years to the life of the contract. Payment is made currently based upon a formula which determines the average daily contract quantity to be purchased. The pipeline schedules its purchases from its numerous sources, correlating these purchases to its diverse market requirements. If this scheduling does not permit some gas to be taken during the time provided for in the gas sales contract, the pipeline prepays for the gas which it can take at a later date. The prepayments amount to compensation for storage of the gas in the field until the pipelines are ready to utilize the gas.

The Commission maintains continuous scrutiny over reserves and deliverability of gas available to pipelines through its report Form No. 15 which must be submitted annually by all pipeline companies.[113] Indicative of its recognition of the scheduling problems of pipeline purchases, the Commission held, when prescribing Form No. 15, that where a pipeline "has an active procurement program" and "its system extends into production areas with continuous exploration and the results thereof indicate a continuing ability to meet gas requirements," the twelve-year deliverability life requirement is relaxed.[114]

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[113] See, Section 260.7 of the Regulations under the Natural Gas Act, 18 CFR 260.7.

[114] Total Gas Supply of Pipeline Companies—Annual Report Form Order No. 279, 31 FPC 750-751 (1964).

When a pipeline seeks a certificate to add new supplies, the information obtained from annual reports is supplemented by the detailed data both as to gas supply and market demands (18 CFR 157.5-157.22). Among the information required of a pipeline is "Exhibit H—Total Gas Supply Data" which contains a statement of the total gas supply committed to, controlled by, or possessed by the applicant, including (1) estimated remaining recoverable reserves, (2) deliverability studies, (3) names and addresses of producers with whom applicant has gas purchase contracts together with the estimated reserves under each contract, (4) maps, and (5) conformed copies of each gas purchase contract upon which applicant relies in support of its proposal.

Additionally, a pipeline application must contain "Exhibit I—Market Data" which includes a system-wide estimate of volumes to be sold together with (1) names and locations of customers giving breakdowns among residential, commercial, firm industrial, interruptible industrial, residential space-heating, commercial space-heating, and other types of customers for each distribution system.

Importantly, the end-use of gas consumed by large direct industrial customers must also be specified.

It is thus obvious that the Commission has prescribed regulations which are tailored to enable it to consider and dispose of all aspects of the public and pipeline need issues in pipeline certificate proceedings. Commission opinions contain many examples of cases where the aspects of need, such as conservation of gas consumed for boiler-fuel purposes, have played a significant role in its decision. See, *e.g., F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961);

Transwestern Pipeline Co., (the *Gulf Pacific* case), Opinion No. 500, 36 FPC 176 (1966), Opinion No. 500-A, 36 FPC 1010 (1966); *Florida Gas Transmission Co.*, Docket No. CP65-393, Opinion No. 516 issued March 1, 1967, and *Transcontinental Gas Pipe Line Corp.*, Docket No. CP65-181 (Phase II), Opinion No. 532, issued November 6, 1967.

Furthermore, the Commission was careful to condition each of the certificates issued to the producers in *Hawkins* and *Sinclair* upon the express condition that the allowance of the take-or-pay provisions in the applicant's contract would be subject to the Commission's ultimate disposition with respect to such provisions in the then pending rule-making proceeding in Docket No. R-199. In that proceeding, the Commission had under consideration the issuance of a rule which would limit provisions in producer rate schedules by prohibiting the use of certain daily contract quantity provisions and unduly short make-up provisions. After careful study and review of comments submitted by interested parties, the Commission, in its Order No. 334, issued January 18, 1967, amended its Regulations to provide for minimum make-up periods for prepaid gas of at least five years. Clearly, this action, which applies to all of the sales involved in these proceedings, amply protects the pipeline industry from the incurrence of substantial prepayment balances and from possible forfeiture or loss of the payments through inability to take the gas.[115]

Quite properly also, the Commission concluded that it is not part of a producer applicant's case to prove

[115] For convenience of the Court, there is attached in Appendix F hereto, a copy of the Commission's Order No. 334 and its Clarifying Order No. 334-A.

the absence of pipeline take-or-pay problems. Of course, it was open to the Intervenors to present evidence, if they could, to show what effect any of these sales might have upon the respective pipeline purchaser's take-or-pay status. Significantly, however, Intervenors adduced no evidence of any kind. Instead, they rely principally upon their contention that they need only suggest the possibility of adverse take-or-pay effect to impose upon the applicants the burden of providing the absence of such effect. Reference to Commission orders in other proceedings which discuss the take-or-pay problem faced by some of the pipelines is no substitute for evidence in these proceedings directed to showing whether or not these particular sales have had any effect upon the respective pipelines take-or-pay positions.

Without conceding that they have a burden of proving the absence of an adverse take-or-pay effect of their sales upon the pipeline purchasers, the producer-applicants in *Hawkins* did adduce evidence which demonstrates that the sales involved in these proceedings did not require the pipeline purchasers to pay for gas which they could never take. Thus, the record shows that of the pipeline companies purchasing gas in the *Hawkins* case, Trunkline Gas Company and Natural Gas Pipe Line Company of America reported no prepayments for gas not taken (III R. 1338). Tennessee Gas Transmission Company reported relatively small prepayments based upon its total operations and there is no showing whatsoever that the prepayments are related to these sales. Likewise, Florida Gas Transmission Company had only a small prepayment sum as of the end of 1963 (III R. 1338-1339). Furthermore, prepayments made by United Gas Pipe Line Company and Transcontinental Gas Pipe Line Corporation,

which are involved in the *Sinclair* case, relate primarily to prepayments for South Louisiana gas, not for Texas Gulf Coast gas (III R. 1336-1337). In substituting its judgment for that of the Commission, the Court of Appeals overlooked the fact that when a producer makes an unrestricted sale to a pipeline, the gas merely becomes part of the pipeline's total system supply. That supply is consumed, ultimately, for a broad range of uses. Typically, some gas is sold to distribution companies for resale to domestic, commercial, and industrial customers. Some portion may be sold for boiler fuel used by electric generating companies, either by the pipelines directly or by the distribution companies.

However, it is not possible to determine where the gas of a particular producer-applicant will be consumed. Standard Commission practice forbids dedication of specific volumes or purchases of gas to specific customers. And the Commission has long held that specific gas supplies of a pipeline cannot be dedicated for specific markets. *Mississippi River Fuel Corp.* v. *F.P.C.*, 252 F.2d 619, 623-625 (D.C. Cir. 1957).

The concept of dedication of producer supplies for specified markets is antithetical to this Court's recent holding in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370 (1965). In that case, the Lo-Vaca proposal concerned a sale to a pipeline company which would have contractually restricted the use of the gas to prescribed points. The Court affirmed the Commission in holding that there could be no restricted sales to a pipeline where the gas was commingled with gen-

eral system supplies. Since some molecules of Lo-Vaca's gas might end up at points of sale for resale to ultimate consumers, Lo-Vaca's sale could not, the Court reasoned, be construed as a sale for the pipeline's own use.

By the same token, all the gas sold by the producers in these proceedings, forms a part of the pipeline purchasers' system supplies. It cannot be attributed to any particular use. Consequently, the lower court's requirement that, before certification of the producer sales, the end-use of the gas must be determined conflicts with controlling law enunciated by this Court.

Section 7(e) places the burden of proof upon the applicant to demonstrate that the public convenience and necessity requires the proposed sale. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). Perhaps in recognition of the fact that its novel theory would impose an impossible burden upon a producer applicant, the Court of Appeals held that the Commission must undertake the burden of proof on this issue.[116] Thus, it suggests that the Commission's Staff should make studies and thereafter the Commission should issue policy statements relevant to large geographic areas or even to the entire gas industry. It would be the Commission's duty, according to the lower court, to "show that the broad statement or study covers the particular certification before it." (IV R. 4301).

Presumably, the producer-applicant would remain responsible for his case as far as other aspects of the

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[116] Obviously, for example, Mr. Stockard, an applicant in these consolidated proceedings, could have no way of showing how customers of his pipeline purchaser will use his gas. The same would be true of any producer-applicant.

public convenience and necessity are concerned. For example, the producer would have the burden of proving that his sales price is in line with other prices in the area. But for proof of the relative superiority of end use of his gas, the producer would be forced to rely upon unknown Staff studies and Commission policy statements. If the Commission or its Staff should, for whatever set of reasons, fail to support that burden, the application would fail. We submit that basic fairness requires that producer-applicants may not be made dependent upon a third party for an essential element of their case. In making the success of a producer application dependent upon proof which might be submitted by the Commission, the decision below violates Section 7(e) of the Act which places the burden of proof upon the applicant.

Finally, it must be recognized that the conservation, or the relative-superiority-of-use question, was raised by the lower court, *sua sponte*. Under the exclusive review procedure provided by Section 19(b) of the Act, a reviewing court may not, of its own accord, raise an issue which was not presented by the parties. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 353 U.S. 944 (1957).

The lower court claims support for its broadening of the issues by reference to statements in the exceptions or applications for rehearing filed by the Intervenors. But careful analysis of the Intervenors' contentions shows that their reference to "public need" was in no way related to the relative-superiority-of-use theory raised by the Court of Appeals. On the contrary, it is quite clear both from the statement of counsel for the Intervenors (*supra*, p. 54) and from the context of Intervenors' arguments in their pleadings that reference was strictly limited to the question

of take-or-pay (See III R. 7114-7120; IV R. 4070-4071; 4244). This narrow issue which relates to whether the pipelines could schedule their purchases without being required to pay for gas which they could not take, is entirely different from the question raised by the Court of Appeals. Until issuance of the lower court's opinion, there had been no suggestion that consumers of any pipeline might be devoting their supplies to an "inferior" use. Since the issue was not raised by any party, Section 19(b) of the Natural Gas Act and Section 10(e) of the Administrative Procedure Act preclude *sua sponte* consideration of this issue by the Court of Appeals, *F.P.C. v. Colorado Interstate Gas Co.*, 348 U.S. 492, 498-499 (1955).

V. CONCLUSION

Through the promulgation of its Policy Statement, and the in-line pricing decisions in *Amerada*,[117] *Hawkins* and *Sinclair*, the Commission has "stabilized," but not frozen, the price line in the Texas Gulf Coast Area. The Commission has the power and the duty under the Natural Gas Act, affirmed by this Court in *Callery*, to reconsider and if necessary to change the price line in a Section 7 proceeding, if it finds such change to be in the public interest. The decision of the Court of Appeals would divest the Commission of this power and through the expedient of removing from the Commission's consideration all possible evidence which could change the line, irrevocably freeze the line at the level arbitrarily selected by the Intervenors without evidence or even explanation. The Commission did

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[117] Together with its later decision in Turnbull & Zoch Drilling Co., 34 FPC 1001, affirmed Continental Oil Company v. F.P.C., 378 F.2d 510 (5th Cir. 1967), also involving District No. 4.

not abuse its discretion and its actions are supported by substantial record evidence and have been affirmed in parallel cases by the Fifth, Ninth, and Tenth Circuits. The decision below of the Court of Appeals which is in conflict with these cases and which goes beyond the permissible bounds of judicial review of an administrative order, should be reversed.

In determining the question of the pipeline's "need" for gas in a pipeline certificate case rather than a producer certificate case, reinforced by a specific rule-making proceeding on the impact of take-or-pay provisions, the Commission properly exercised its expertise and arrived at the most practical solution to the question from the standpoint of producer, pipeline and consumer. The attempt of the Court of Appeals to substitute its judgment for that of the Commission on this issue should be overruled.

Respectfully submitted,

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APPENDIX A

These consolidated proceedings, including Nos. 60, *et al.*, arising out of the Tenth Circuit, and Nos. 111, *et al.*, arising out of the District of Columbia Circuit, involve two major court decisions relating to three issues. They involve review of four opinions of the Federal Power Commission. To assist the Court in understanding the relationship between the several cases, we have set forth below a brief resume of their procedural background:

Nos. 60, 61, and 62 relate to the opinion of the Court of Appeals for the Tenth Circuit issued December 9, 1966, in *Sunray DX Oil Company* v. *F.P.C.*, 370 F.2d 181 (10th Cir. 1966), in which the court upheld the Commission's decision in consolidated producer certificate proceedings [Re *Amerada Petroleum Corp., et al.*, Opinion No. 422, 31 FPC 623 (1964)] so far as that decision determined an in-line price for producer sales in Texas Railroad District No. 4. However, the court reversed the Commission on a different ground, holding that the Commission has no power to order producers to make refunds of amounts collected pursuant to unconditioned temporary certificates. Immediately prior to issuance of the lower court's opinion on review of the Commission's *Amerada* Opinion No. 422, the Commission, on December 6, 1966, issued its *Amerada* Opinion No. 501-A in the same proceedings which was devoted entirely to the refund issue. In Opinion No. 501 the Commission held both that it has the power to order refunds in these circumstances and, further, that, based upon equitable considerations, refunds should be made. Upon the filing of petitions for review of *Amerada* Opinion No. 501, the court held by *per curiam* opinion issued March 27, 1967, that its earlier decision on review of Opinion No. 422 controlled. Accordingly, it reaffirmed its conclusion that the Commission lacks the power to order refunds of amounts collected pursuant to unconditioned temporary certificates (II R. 6759-6765). Having decided the refund

issue on the basis of the lack of Commission power, the court expressly did not pass upon the question whether, if Commission power were assumed, the Commission had properly decided the equitable considerations (II R. 6890). Petitions for certiorari in Nos. 80 and 97 relate to the lower court's review of the *Amerada* Opinion No. 501.[1]

Case Nos. 111, 143, 144, and 231, relate to a single opinion of the Court of Appeals for the District of Columbia Circuit issued February 7, 1967, in *Public Service Commission of the State of New York* v. *F.P.C.*, 373 F.2d 816 (D.C. Cir. 1967), in which that court reversed the Commission's decisions in two consolidated producer certificate proceedings [Re *Hawkins & Hawkins*, Opinion No. 475, 34 FPC 897 (1965) and Re *Sinclair Oil & Gas Co.*, Opinion No. 476, 34 FPC 930 (1965)]. The court reversed in-line price determinations for producer sales in Texas Railroad Districts Nos. 3 and 2, respectively (IV R. 4302-4316). It also reversed the Commission's holding that questions of pipeline and public need for the gas should more appropriately be determined in pipeline certificate proceedings (IV R. 4293-4301).

The producers, Shell Oil Company (No. 111), and Skelly Oil Company, *et al.* (No. 143) intervened in the D.C. Circuit Court proceedings in support of the Commission's determinations. These producers petitioned the Court for certiorari to the Court of Appeals for the District of Columbia Circuit decision reversing and remanding Commission opinions in *Hawkins* and *Sinclair*.

Because of the manner in which these cases have arisen, producers are respondents in the Tenth Circuit cases (Nos. 60, 61, 62, 80, and 97) and petitioners in the District of

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[1] Review of Opinions Nos. 422 and 501 was sought by a number of producers, the first producer in point of time being *Sunray DX Oil Company*. Accordingly, the proceedings in the Tenth Circuit are sometimes referred to as the *Sunray* case.

Columbia Circuit cases (Nos. 111, 143, 231). However, only one producer is involved in both the Tenth Circuit and the District of Columbia Circuit cases. The producers, except The Superior Oil Company, support the Commission's in-line price determinations in all cases and its decision on the need issue in *Hawkins* and *Sinclair*. They support the decision of the Court of Appeals for the Tenth Circuit on the in-line issue and the retroactive refund issue. Producers are petitioners on the in-line issue from the decision of the District of Columbia Circuit (Nos. 111 and 143). The producer-petitioners in No. 143 also raise the need issue. The producers are respondents in all cases arising out of the Tenth Circuit (Nos. 60, 61, 62, 80, and 97).

Another producer, The Superior Oil Company, sought review of the *Sinclair* Opinion No. 476 on the ground that the in-line price was too low. Superior is also seeking review in this Court of the lower court's decision on the in-line issue (No. 231).

The distributor interests, including the Public Service Commission of the State of New York, filed separate petitions for review of *Amerada* Opinion No. 422, which were consolidated in the Tenth Circuit with producer petitions filed by Sunray DX Oil Company, *et al.* The distributor interests oppose the Commission's price-line determination in *Amerada* Opinion No. 422 which was affirmed by the Court. They support the result reached by the Commission on the retroactive refund issue. Consequently, the distributor interests are petitioners opposing the decision of the Court of Appeals for the Tenth Circuit on the price-line and refund issues (Nos. 61, 62, 97).

The distributor interests sought review of the *Hawkins* Opinion No. 475 and the *Sinclair* Opinion No. 476, raising both the price-line and the need issues. Since the Court of Appeals for the District of Columbia Circuit reversed the Commission on these issues, the distributor interests are

respondents in the cases arising out of that Circuit (Nos. 111, 143, 144 and 231).

The Commission, having been reversed on the retroactive refund issue in the Tenth Circuit, is a petitioner with regard to that issue (Nos. 60 and 80). It is a respondent on the in-line issue in that Circuit (Nos. 61 and 62). On the other hand, since the Commission was reversed on the in-line issue by the Court of Appeals for the District of Columbia Circuit, it is a petitioner here on that issue (No. 144). The Commission's petition does not raise the need issue.

APPENDIX B

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

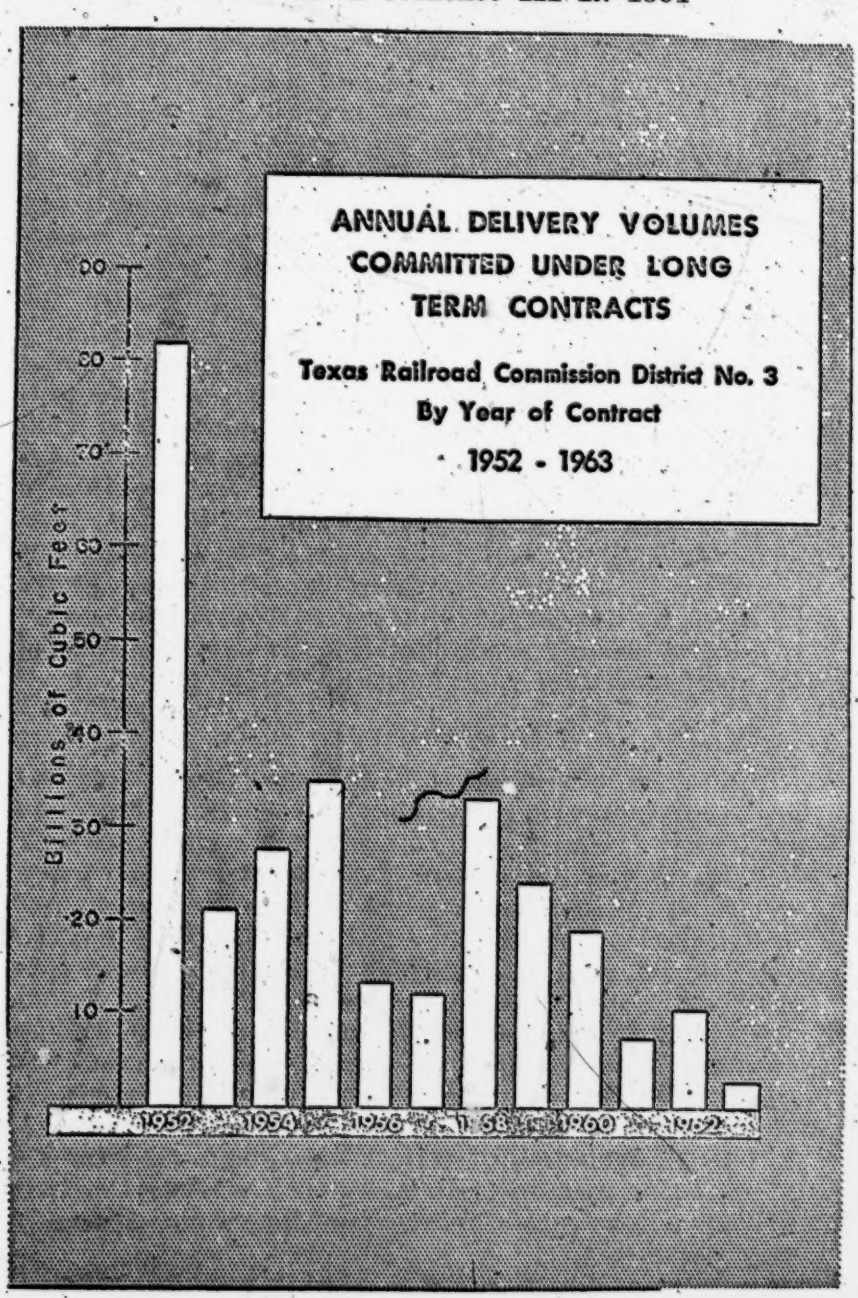
> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *."

Section 7(e), 15 U.S.C. 717f(e):

> "* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

APPENDIX C

Exhibit 5
Witness Celia Star Gody
III R. 1491
Received in evidence III R. 1364



APPENDIX D

Distribution of Prices Permanently Certificated

(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	4.50
13.5	8	116,100	4.35
14.0	3	60,750	2.28
14.2	1	45,000	1.69
14.4	1	90,000	3.38
14.5	4	132,000	4.95
14.6	2	96,000	3.60
15.0	8	295,075	11.07
15.1	1	60,000	2.25
15.2	3	166,170	6.23
16.0	4	968,000	36.31
16.2	4	514,000	19.28
17.5	1	2,190	0.08
18.0	1	731	0.03
	44	2,666,016	100.00

Distribution of Prices Permanently Certificated

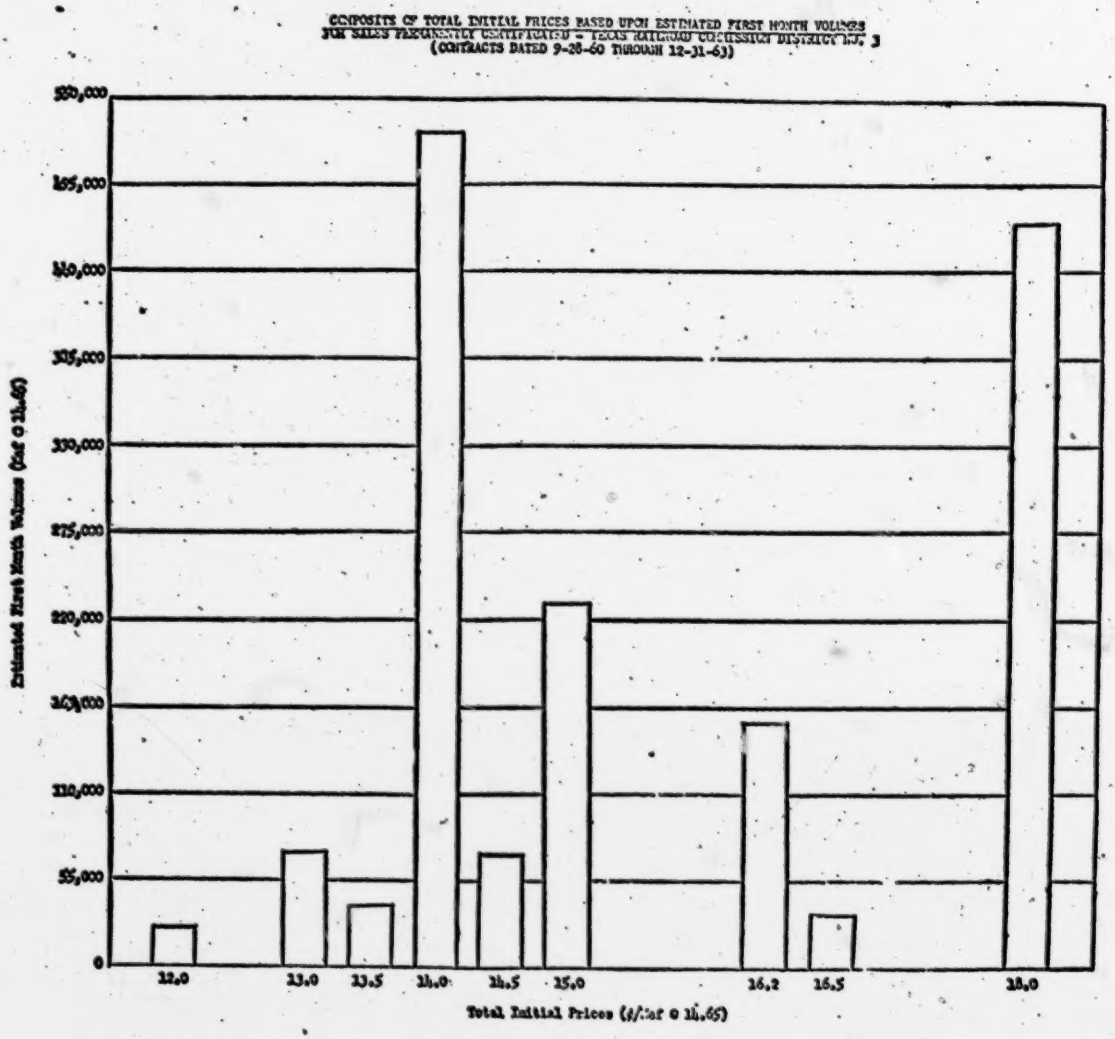
(Dated 9-28-60 through 12-31-63)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	2.13
13.0	2	75,000	6.64
13.5	2	33,615	2.98
14.0	2	42,000	3.72
14.5	3	75,000	6.64
15.0	9	213,100	18.88
16.2	3	155,000	13.73
16.5	1	30,000	2.66
18.0	3	481,040	42.62
	27	1,128,755	100.00

APPENDIX E

(Exhibit 2—Staff Witness Russell T. Jones Hawkins Case)

III R. 1453—Received in Evidence III R. 928



Distribution of Prices
Permanently Certificated Sales
(Contracts Dated 9-28-60 Through 12-31-63)

Total Initial Price	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	1.47
13.0	2	75,000	4.59
13.5	2	33,615	2.06
14.0	12	531,020	32.51
14.5	3	75,000	4.59
15.0	10	228,600	14.00
16.2	3	155,000	9.49
16.5	1	30,000	1.84
18.0	3	481,040	29.45
Total	38	1,633,275	100.00

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 154 and 157]

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and and John A. Carver, Jr.

Docket No. R-199

Non-acceptability of Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses

Order No. 334

Prescribing Certain Make-Up Provisions

(Issued January 18, 1967)

On May 22, 1961, the Commission issued a Notice of Proposed Rulemaking in this proceeding (26 F.R. 4615), as amended on June 20, 1961 (26 F.R. 5689), and as further amended on March 16, 1965 (30 F.R. 3715), wherein it proposed to limit provisions in rate schedules by prohibiting the use of certain daily-contract-quantity and make-up provisions in contracts for the sale for resale of natural gas by independent producers in interstate commerce. This rule was proposed primarily because of the potential economic dangers posed by the prepayment positions of many pipeline companies and the likelihood of higher gas costs for consumers caused thereby, contrary to the public interest.

Comments were invited from interested persons and 42 replies to the amended notice were received.[1] Of these, 32, including the Independent Natural Gas Association of America, representing pipeline companies, and the Independent Petroleum Association of America, representing producers, requested termination of the proceeding without any affirmative action. In addition, a number of pipeline companies, independent producers, the Railroad Commission of the State of Texas and the Kansas Corporation Commission independently filed responses in opposition to the proposal. Ten parties submitted responses suggesting substantial modifications to the proposed rule. Included among them were various distribution companies, independent producers and the Pennsylvania Public Utilities Commission.

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[1] Amerada Petroleum Corporation; Ashland Oil and Refining Company; Associated Gas Distributors; Perry R. Bass; The California Company, a division of California Oil Company; Cities Service Company, Cities Service Oil Company, Columbian Fuel Corporation; Columbia Gas System Companies; Consolidated Gas Supply Corporation; Continental Oil Company; El Paso Natural Gas Company; Forrest Oil Corporation; Gulf Oil Corporation; Humble Oil and Refining Company; Hunt Interests; Independent Natural Gas Association of America; Independent Petroleum Association of America; Kansas Corporation Commission; Kansas-Nebraska Natural Gas Company, Inc.; Kerr-McGee Oil Industries, Inc.; Marathon Oil Company; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Pan American Petroleum Corporation; Panhandle Eastern Pipe Line Company; Pennsylvania Public Utilities Commission; Philadelphia Gas Works Division of The United Gas Improvement Co.; Phillips Petroleum Company; Railroad Commission of Texas; Shell Oil Company; Sinclair Oil and Gas Company; Socony Mobil Oil Company, Inc.; Southern Natural Gas Company; Sun Oil Company; Superior Oil Company; Tennessee Gas Transmission Company; Texaco, Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipeline Corporation; Trunkline Gas Company; Union Oil Company of California; Warren Petroleum Corporation.

The Commission has carefully reviewed the various comments and has considered the prepayment obligations of the pipeline companies as they currently exist. While we maintain concern over the potential harm which could be caused by an undue burden of excess prepayment balances, we are cognizant of the fact that there are but a limited number of pipeline companies who currently have made prepayments to the same degree as that prevalent in earlier years. Most companies have been able to reduce their prepayment burdens. One major contribution to the alleviation of the burden has been our relaxation of the 12-year deliverability requirement for pipeline companies, resulting from a change in Commission policy (see § 2.61 of regulations, 18 CFR 2.61; promulgated by Order No. 279, March 31, 1964, 31 FPC 750, 29 F.R. 4873.)

A general application of the standards herein proposed would not necessarily result in savings to consumers. Responses to the notice of proposed rulemaking demonstrate that while certain of the provisions might be beneficial as to specific pipeline companies, they would not be desirable as to other pipeline companies and the application of the standards might be such as to require investment by producers even in instances where not necessary. We have found that the proposals in this rulemaking proceeding have been complied with in many gas sales contracts and that in other cases the specific pipeline companies purchasing gas either do not require the proposed prepayment provisions for efficient operation of their systems, or have entered into contracts with the producers which contain provisions meetings their specific needs. Accordingly, most of the proposed provisions would serve no valid purpose today. We do recognize, however, that where pipeline companies have made prepayments for gas not taken, a broad approach to insure the ability of the companies to make-up this prepaid gas is necessary. This approach should be consistent with one which does not

result in a substantial unjustified burden to the producer who must make the gas available. We find that a lengthening of the make-up period to a minimum of 5 years will provide relief for those pipeline companies that might otherwise incur substantial prepayment balances on their books and will lessen the risk of future forfeiture and loss of the payments. Since the independent producers already will have received payment for this gas, we do not foresee any substantial harm to them by the imposition of the requirement that contracts entered into after the effective date of this order shall contain make-up provisions permitting the pipeline companies to make-up prepaid gas within a minimum of 5 years from the date the prepayment is made. During the 5-year period before termination of the contract, the make-up period will be shortened consistent with the time remaining under the contract.

In other respects we find that, at this time, it is unnecessary that the remaining portions of our proposed rule become effective and we will terminate the proceeding as to them.

Since the initiation of the proposed rule in 1961, the Commission, in a number of opinions and orders, has conditioned the issuance of numerous producer certificates making them subject to the final outcome of Docket No. R-199. Each of those producer certificates will be subject to the rule which is prescribed herein. Amendments to the rate schedules for each of these producers should be filed within 60 days from the issuance hereof to provide a make-up period of no less than 5 years in the event there are prepayments for gas not taken for those contracts which have provided a make-up period of less than 5 years.

The Commission further finds in view of the foregoing and upon consideration of all relevant matters presented, including the arguments, contentions, suggestions and other views expressed in the comments received, it is necessary

and appropriate in the administration of the Natural Gas Act that the Regulations under the Natural Gas Act be amended as herein provided.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, as amended, particularly sections 4, 5, 7 and 16 thereof (52 Stat. 822, 823, 825, 830; 56 Stat. 83; 15 U.S.C. 717c, 717d, 717f and 717o), *orders:*

(A) Part 154, Subchapter E, Regulations Under the Natural Gas Act, Chapter I, of Title 18 of the Code of Federal Regulations, is amended by adding a new § 154.103 and revising § 154.110 as follows:

"§ 154.103 Limitations on provisions in rate schedules relating to make-up period for taking prepaid-for gas.

Contracts for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, executed after February 1, 1967, will be rejected if they contain provisions precluding buyer from receiving, at no additional charge per Mcf, gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken, subject to contract provisions to protect against drainage. If the contract terminates before the end of the minimum five-year make-up period, a shorter make-up period, consistent with the time remaining under the contract, will be permitted.

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§ 154.110 Applicability of §§ 154.92 through 154.103.

Sections 154.92 through 154.103 shall be applicable only to those persons specified in § 154.91 and shall not apply to small producer sales made under small producer certificates issued pursuant to § 157.40 of this chapter."

(B) Part 157 of the said Title 18 is amended by revising *Exhibit B* in § 157.25 to read as follows:

"§ 157.25 Necessary exhibits.

There shall be filed * * * the following exhibits:

* * * * *

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Prvided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter. The application will be rejected if any contract, executed after February 1, 1967, submitted in support thereof contains any make-up provisions proscribed by § 154.103 of this chapter."

(Secs. 4, 5, 7, 16, 52 Stat. 822, 56 Stat. 83; 15 U.S.C. 717c, 717d, 717f, and 717o)

(C) In all other respects the proceeding herein is terminated.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(Seal)

JOSEPH H. GUTRIDE,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR 154.103)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. R-199

Non-acceptability of Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses

Order No. 334-A

Clarifying and Modifying Order No. 334

(Issued March 21, 1967)

By order issued January 18, 1967, (37 FPC —, 32 F.R. 865) the Commission amended Part 154, Subchapter E, of its Regulations by adding § 154.103 which prescribed limitations on provisions in rate schedules relating to a make-up period for taking prepaid gas, and amended § 157.25 to provide for the rejection of applications for certificates of public convenience and necessity if a contract, executed after February 1, 1967, submitted in support of an application contained any make-up provisions proscribed by § 154.103. Petitions and Applications for Reconsideration, Rehearing and Clarification and Motions for Stay were filed or joined in by Shell Oil Company, Pan American Petroleum Corp., Humble Oil & Refining Company, Mobil Oil Corp., Sinclair Oil & Gas Company, and Phillips Petroleum Company.[1]

[1] Herein referred to jointly as "producers." These petitions and applications are being considered as motions for reconsideration and clarification because an application for rehearing does not lie on an order prescribing a rule.

The main objections of the producers are: (1) that a make-up period of five years is not required; and (2) to the limitation that the contract provide that the buyer should be permitted to receive "at no additional charge per Mcf" gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken. The producers argue that the burden imposed upon them if the five year make-up period is not changed is too harsh in that it does not take into consideration increases in costs over a period of time, the possibility of increased taxes, changes in Btu of the gas and potentially higher royalty payments which they might have to pay to royalty owners.

We intend by the words "at no additional charge per Mcf" that the pipeline companies should not be required to pay an additional charge in order to obtain the extension of the make-up period to 5 or more years.[2] It would be appropriate for the pipeline purchaser to pay, or receive credit for, the difference between the rate when the make-up gas is taken and the rate at which the prepayment was made, depending upon whether the prepayment rate will be higher or lower than the subsequent rate at the time of make-up. In appropriate circumstance the contracting parties may deem it desirable to make the prepayment price the total price for the gas. Such an alternative is acceptable and we shall so provide. We shall revise § 154.103 as hereinafter provided.

In view of our action herein, we see no need to stay the effectiveness of our order, and, accordingly will deny the requests for stay.

In Order No. 334, we noted that each producer certificate which had been issued, conditionally, subject to the final

[2] Thus, if a contract may otherwise provide for a shorter time than five-year term, it would not be proper to apply a surcharge in order to extend that period to five years.

outcome of Docket No. R-199 would be subject to the rule prescribed therein. We required that each of those producers file amendments to his rate schedules to reflect this rule. Some question appears to have resulted from the wording in that order. To clarify that portion of the order we shall make it clear that each producer whose certificate was conditioned to the final outcome of Docket No. R-199 shall file a contract amendment to his rate schedule to provide for a make-up period of at least five years where, under the contract, the pipeline purchaser is required to pay for the gas whether or not taken, *i.e.*, to make prepayments. No additional charge shall be made to the pipeline purchaser in order to obtain this provision in the gas sales contract. The time for filing such contractual amendment is extended to 30 days from the date of this order.

The Commission orders:

(A) The new § 154.103, prescribed by ordering paragraph (A) of Order No. 334 in this proceeding as an amendment to Part 154, Subchapter E, Regulations Under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations, is revised to read as follows:

> § 154.103 Limitations on provisions in rate schedules relating to make-up period for taking prepaid gas.
>
> Contracts for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, executed after February 1, 1967, will be rejected if they contain provisions precluding buyer from receiving gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken, subject to contract provisions to protect against drainage. If the contract terminates before the end of the minimum five-year make-up period, a shorter make-up period, consistent with the time remaining under the contract will be permitted. The contract may provide that the prepayment price

is the total price for the gas. In the alternative the contract may provide that where the price being collected under the contract has changed between the date that the gas was paid for but not taken and the date the gas is made-up, the make-up gas will be delivered at the price effective at the time it is delivered. If the price has decreased, the decrement will be set off against payments for other gas delivered under the contract and if the price has increased pursuant to the provisions of section 4 of the Natural Gas Act, any increase provided for the make-up gas should be subject to any rate order issued by the Commission in the appropriate rate action.

(B) This amendment shall be effective January 18, 1967 *i.e.*, the issuance date of Order No. 334.

(C) Within 30 days from the issuance of this order each producer whose certificate of public convenience and necessity was conditioned to the final outcome of Docket No. R-199 shall file a contract amendment to his rate schedule to provide for a make-up period of at least five years where, under the contract, the pipeline purchaser is required to pay for the gas whether or not taken, *i.e.*, to make prepayments. No additional charge shall be made to the pipeline purchaser in order to obtain this provision in the gas sales contract.

(D) The Motions for Stay of Order No. 334 are denied.

(E) To the extent not adopted herein, the Motions for Reconsideration and Clarification are denied.

(F) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 60, *et al.*

FEDERAL POWER COMMISSION, ET AL., *Petitioner,*

v.

SUNRAY DX OIL COMPANY, *Respondent.*

No. 111

SHELL OIL COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent.*

No. 143

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY, *Petitioners,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR SHELL OIL COMPANY, SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., AND EDWIN M. JONES OIL COMPANY

QUESTIONS CONSIDERED

Only The Brooklyn Union Gas Company, *et al.*, referred to in our initial brief and herein as "Intervenors," attack the Commission's decision on the in-line price and "need" issues. We reply to questions 1 and 2 set out in their initial brief.[1]

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[1] These are the same questions presented in our initial brief stated in inverse order.

ARGUMENT

1. Temporarily Certificated Prices v. Uncontested Permanently Certificated Prices

The Intervenors seek to create the impression (Int. Br. p. 28) that there are prices which were permanently certificated *following a hearing* which the Commission could have relied on in Districts 2, 3, and 4, to determine the price line since September 28, 1960. We wish to make it unmistakably clear: *there are* NO *permanent certificates issued after a full hearing in Districts 2, 3, and 4 for contracts dated after September 28, 1960,* except those certificates issued by the Commission in the three cases here under review, together with the *Turnbull and Zoch* case affirmed by the Fifth Circuit in *Continental Oil Co.* v. *F.P.C.*, 378 F.2d 510 (5th Cir. 1967).[2]

The only permanent certificates in existence for contracts executed during this time period are those certificates issued under the abridged, or uncontested procedure, without hearing, as provided for by the Commission's Rules (18 CFR 1.32).[3]

Under the Commission's Rules, *the consideration given to the price* issue is identical in a temporary certificate case and in an uncontested permanent certificate case. The contract price is compared to the Commission's guideline price (or in-line price, if one

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[2] Certiorari pending in Cases No. 504, 520, 526, and 628.

[3] At page 14 of their brief, Intervenors criticize the Commission for giving weight to three sales at 18¢ which were permanently certificated under the abridged procedure. Intervenors fail to mention that *all* of the sales at lower prices, which *they* would rely on to fix the price line, were also certificated under the *same* abridged procedure.

has been determined). If the contract price is below the guideline price, a temporary certificate or an uncontested permanent certificate will be issued without condition reducing the initial price. If the contract price is above the guideline price, a price condition will be attached reducing the price to the guideline price in the temporary certificate.[4] The Commission will normally then write the producer a letter, stating that if the producer will accept a permanent certificate, with a condition reducing the price to the guideline price, such certificate will be issued under the abridged (uncontested) procedure.[5] In most cases the producer agrees, as it is unlikely that the Commission can be made to change its view even after a hearing, under the restrictions which the Commission places on the evidence which can be introduced. Upon being advised that the producer will accept such a conditioned certificate, the Commission, after giving public notice and affording the opportunity for interventions, will issue the certificate, if no interventions are filed under the abridged procedure.

What then is the essential difference in the Commission's procedure in an uncontested permanent certificate and in a temporary certificate? Only one thing —the filing of an intervention by a distributor company or a State Commission. If such interventions are filed, deliveries must be made under a *temporary* certificate until the contested proceeding is completed. If *no* intervention is filed, deliveries are made under a *permanent* certificate issued under the abridged procedure.

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[4] See footnote no. 2 on page 6 of Commission's Brief.

[5] See, *e.g.*, the letters to the Hunt interests in Dockets CI61-1282 and CI61-1283, consolidated in *Hawkins*, at 25 FPC 654-655.

The argument made by the Intervenors on the in-line issue may then be reduced to this: "If we decide to contest a price, the Commission cannot use it in its in-line determination; but if we decide (because the price is below *our* selected level) not to contest the price, the Commission must not only use this price, but *cannot look to anything else* to determine the price line." This is simply an attempt to usurp the Commission's function of determining the price line.

2. Permanent Certificates in Contested Proceedings

As we pointed out above, there are no permanent certificates issued after a full hearing for contracts dated after September 28, 1960, other than those here under review.[6] There are, of course, permanent certificates issued after a hearing for contracts dated *prior* to September 28, 1960. As noted in the Intervenors' Statement of Facts (Int. Br. pp. 7-9), the *Skelly, Texaco Seaboard,* and *Hassie Hunt* cases, which determined the in-line price for the contracts dated prior to September 28, 1960, *expressly did not determine the in-line price for the period after September 28, 1960,* and severed the dockets dealing with these later contracts and included them in these proceedings. If these are the "permanent certificates following hearing" to which Intervenors refer (Br. p. 28), then their intention to roll back the prices to a level existing in an earlier time period becomes clear.[7] Indeed, this

[6] Including those pending in Cases 504, 520, 526 and 628.

[7] Intervenors do not refer to other contested permanent certificates issued prior to September 28, 1960, but after a full hearing, in Trunkline Gas Co., 21 FPC 704, at 20¢ in District 3, and in Houston Texas Gas & Oil Corporation, 16 FPC 118, at 17.5¢. Intervenors contend that these prices must be ignored because they were issued under pre-Catco standards; see discussion in Superior's Brief, pp. 16-35.

intention is stated in the footnote on page 26, where they state "we submit that the most appropriate line to be held is the line obtaining in June, 1954, when the Commission first began to exercise its regulatory jurisdiction over producers."

3. The Use of the Statement of General Policy Guideline Prices

The Intervenors and the D.C. Circuit seem to regard the Policy Statement guideline levels as the primary basis for the Commission's decision on the in-line price for the period after September 28, 1960. While the Commission could not "ignore its own Policy Statement," [8] the in-line price for the latter period is not based solely, or even primarily, on the guideline price. The Commission set out to determine,[9] and did determine, *the impact on the industry* of its guideline price levels. It found that these levels had had a stablizing effect on the industry, forcing the producers who were able to make the highest price contracts to reduce their contract prices (often without any action by the Commission) while permitting the lower prices to increase to the guideline levels. It was the *market action which resulted from the Policy Statement,* not the Policy Statement itself, that the Commission looked to in de-

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[8] On this the D. C. Circuit and Tenth Circuit are in agreement; see Sunray decision, I R. 6714,, and Public Service Commission of New York v. F.P.C., 329 F. 2d 242, 247 (D. C. Cir. 1964).

[9] In Skelly Oil Company, 28 FPC 401, 412 (1962), the Commission severed the dockets involving contracts dated after September 28, 1960, for the express purpose of determining the effect of its guidelines prices on subsequent market conditions. A similar procedure was followed in District 3, in Texaco Seaboard, 29 FPC 599 (1963) and in District 2 in Hassie Hunt Trust, 30 FPC 1442-44 (1963).

termining that the in-line price was higher after September 28, 1960.[10]

Moreover, it should be recalled that since the Commission established the in-line prices for pre-September 28, 1960, sales retrospectively by orders issued in *Texaco Seaboard Inc.*, 29 FPC 593 (March 27, 1963), and *Hassie Hunt Trust, Operator,* 30 FPC 1438 (December 9, 1963), there were no in-line prices to which reference could have been made during the interim period. Thus, in contrast to the guideline price levels, in-line price levels could have had no effect upon market conditions or the adequacy of gas supply.

4. The Price Freeze

The Commission Brief (pp. 26-27) correctly points out that ignoring all non-permanent prices would necessarily freeze the price level at the first in-line determination for a given area. The Commission further points out that it was never required, under *Catco* and *Callery,* to ignore market conditions, but (in *Callery*) simply was excused from considering voluminous evidence of these conditions tendered by the producers because of administrative expedience. Therefore, the D.C. Circuit's exclusion of contract prices on the ground that they do reflect current market conditions is in error (Int. Br. pp. 29-30).

Intervenors contend that the producers' right to file for rate increases under Section 4(e) prevents a "freeze" of producer prices (Int. Br. pp. 30-31). Intervenors argue, in effect, that it doesn't matter whether the price line is fixed too low or not, as the producers can collect their contract rates by filing for rate in-

[10] See, *e.g.*, III R. 226, III R. 327, III R. 333, III R. 359.

creases under Section 4(e). As we pointed out in our Initial Brief (pp. 38-40) the producers' right to file rate increases is severely circumscribed by the moratoriums imposed by the Commission in both temporary and permanent certificates.[11] The Commission further has the power, which it customarily exercises, to delay the collection of the increased rate for six months after it is filed.[12] Furthermore, as the Commission notes in footnote 21, page 29, where the Commission requires refunds down to the permanently certificated price levels, there is no way that the producer can retroactively file for rate increases under his contracts.[13] Under these circumstances, should the Commission later find in the Texas Gulf Coast Area Rate Proceeding that the in-line price levels it had fixed were too low, the producer could never recover the money he had been required to refund, or had been precluded

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[11] An example of the effect of the moratorium in temporary certificates can be seen by referring to the Hunt dockets. The same Hunt dockets considered by this Court in F.P.C. v. Hunt, 376 U.S. 515 (1964) in which the moratorium against filing rate increases prior to the issuance of a permanent certificate was sustained, are consolidated in the *Hawkins* case here under review. These sales have been under a moratorium against rate increases since the temporary certificates were issued on April 7, 1961, 25 FPC 654, first under the temporary certificate at the conditioned price level of 18¢, and under the *Hawkins* decision, issuing permanent certificates, the moratorium was continued at the level of 19¢.

[12] The Commission's Regulations [18 CFR 154.94(b)] and Section 4(d) of the Natural Gas Act provide that the increase shall not be effective until 30 days after it is filed. The Commission has the power under Section 4(e) of the Natural Gas Act to suspend the collection of the increased rate for an additional period of five months.

[13] Shell Oil Co v. F.P.C., 334 F. 2d 1002, 1009 (3rd Cir. 1963); F.P.C. v. Tennessee Gas Transmission Co., 371 US 145 (1962).

from collecting under price and moratorium conditions.[14]

5. The Inadequate Gas Supply

The producers sought to introduce evidence of an economic nature tending to prove (1) that higher price levels would create additional incentives, (2) the reserves-production ratio in the Texas Gulf Coast Area has been declining, and (3) evidence showing trends in supply and demand on a national and area basis. This evidence was excluded.[15]

Therefore, the Commission had only the schedules and the testimony of Commission Staff witness and producer witness Gody, which show a steady decline in new gas commitments to the interstate market in District 3. Other evidence also shows that an increasing share of the supply was being appropriated by the intrastate sales.[16] As the Commission states in its brief (FPC Br. 32-37) all of these factors went into the Commission's considered judgment that the price line should not be further reduced.

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[14] As noted at page 38 of our Initial Brief, the in-line levels are below the levels recommended by the witness for the distributors as the just and reasonable rates in the Area Rate Proceeding. In that proceeding the Commission Staff has recommended a rate of 16.8 cents for all sales delivered at a central point under contracts dated after January 1, 1961. Producers recommend a rate of 20 cents for the same period.

[15] Hawkins, III R. 36-37; 516-518; Sinclair, IV R. 46-48. The type of evidence which the producers sought to offer is detailed in Appendix B of the Initial Brief of Sunray DX Oil Company, *et al.* This same type of evidence was made an offer of proof in both Hawkins and Sinclair; see III R. 36-37 and IV R. 94-96.

[16] This evidence was excluded by Examiner but retained as an offer of proof (IV R. 315).

The statement that appears at page 31 of Intervenors' brief, attacking the Commission's failure to find that the earlier in-line price levels had failed to elicit adequate supplies, is particularly ironic in the light of the firm position taken by counsel for Intervenors that no evidence on supply is admissible in a Section 7 certificate proceeding.[17] Such evidence was tendered here and rejected, upon the objection of, among others, counsel for Intervenors. Having objected to the inclusion of evidence tending to prove that gas supplies were inadequate in the Texas Gulf Coast Area, Intervenors cannot now be heard to complain of the absence of findings on that issue, other than the limited findings which the Commission did make, based on evidence in the record, that market conditions had changed.

6. The Commission Properly Concluded That the "Need" Issue Should Be Resolved by Rule-Making or in Pipeline Certificate Cases

In our Initial Brief we showed that the Commission acted reasonably in determining that questions of pipeline and public need for gas should be resolved in pipeline certificate cases or in general rule-making proceedings where all of the relevant information can be readily marshalled. Contrary to the implication at page 23 of Intervenors' Initial Brief, the Commission does not approve producer sales prior to authorization of the necessary pipeline proposal to take the gas. Thus, the Commission expressly found in the *Sinclair* case that the Intervenors' contentions as to take-or-pay were raised "after the certificate of the pipeline purchasers had been authorized" (IV R. 4185). More-

[17] See Counsel's statement in the Hawkins case at III R. 29-30.

over, in the contemporaneous proceedings in *Turnbull & Zoch Drilling Co.*, the Commission emphasized that if producer certificates were issued prior approval to a pipeline project, the producer certificates would be subject to the *caveat* that if the pipeline certificate were denied, the producers would no longer have a market for their gas.[18]

In this context, the Commission's decision to discount the Intervenors' unsupported allegations and determine questions of public need in more appropriate proceedings was a reasonable exercise of its discretion. Bear in mind, as did the Commission in its reference to the "nature of the gas business," that prepayment for gas is not contrary to the public interest. It may indicate a sound decision of pipeline companies to contract for supplies of gas and keep the gas in storage for future use. Since the Commission's general rule in Docket No. R-199 providing extended make-up periods virtually assures that no prepaid gas will be forfeited,[19] the existence of prepayments, even if they could have been traced to the purchasers here involved, can, in no sense, be considered detrimental. In the *United Gas Pipe Line* case, Opinion No. 428, 31 FPC 1180, 1191-1192, referred to by Intervenors (Int. Br. p. 24), the Commission recognized that prepaid gas is an asset like other prepayments.

We submit that the Court of Appeals for the Fifth Circuit was correct when it held upon review of the

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[18] Turnbull & Zoch Drilling Co., 32 FPC 877, 878-879 (1964).

[19] Order No. 334, Docket No. R-199, issued January 18, 1967. See page 61 of our initial brief. See, also, FPC Br. p. 51.

Turnbull & Zoch Opinion No. 478 (*Continental Oil Co. v. F.P.C.*, 378 F.2d 510 at 526):

> "The FPC has been encouraged to devise reasonable means of streamlining its procedures. Federal Power Commission v. Hunt, 376 U.S. 515 at 527, 84 S.Ct. 861, 11 L.Ed 2d 878. The FPC should and does have discretion to consider the question of public need in rule making proceedings or in pipeline certification cases.
>
> * * *
>
> "Where there are hundreds of producers in § 7 proceedings who cannot have any knowledge of ultimate demand, the result would be either a forced intervention of the pipelines and prolongation of the hearings, or possible collateral attack on the pipeline certificate cases. To force a general consideration of need in § 7 proceedings would force consideration of that type of market evidence whose exclusion *Callery* specifically sanctioned on the price issue."

CONCLUSION

At the core of the in-line price issue is the question whether the determination of the price line is to be made by the Federal Power Commission, as provided by the Natural Gas Act, the Administrative Procedure Act, and prior decisions of this Court, or whether, through excluding all evidence and prices which Intervenors elect to contest, the power to make this determination is to be taken over by Intervenors. A further basic issue is whether the Commission may, even in the limited way followed here, consider current conditions in the industry, and where it finds those conditions require a change, to change the price line accordingly. As the resolution of the just and reasonable rate is a lengthy process, the Commission must have the power to consider changes in the supply situation in a given

area, and fix the in-line price as may be required without awaiting the termination of a rate proceeding, if an adequate supply for consumers is to be assured. The decision of the District of Columbia Circuit, which would deny the Commission this power, should be reversed.

Likewise, the Commission's reasonable exercise of discretion to consider the question of public need in rule-making and pipeline certification cases should be upheld.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 60

FEDERAL POWER COMMISSION,

Petitioner

v.

SUNRAY DX OIL COMPANY, *et al.*

No. 61

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner

v.

SUNRAY DX OIL COMPANY, *et al.*

No. 62

THE BROOKLYN UNION GAS COMPANY, *et al.*

Petitioners

v.

FEDERAL POWER COMMISSION, *et al.*

No. 80

FEDERAL POWER COMMISSION,

Petitioner

v.

STANDARD OIL COMPANY OF TEXAS,
A Division of Chevron Oil Company, *et al.*

No. 97

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner

v.

SUNRAY DX OIL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GULF OIL CORPORATION, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC., UNION PRODUCING COMPANY, AND CLARK FUEL PRODUCING COMPANY

January 8, 1968

Names and addresses of Counsel appear on the inside of this cover.

FIDELITY PRINTING COMPANY, INC., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 60

FEDERAL POWER COMMISSION,

Petitioner

v.

SUNRAY DX OIL COMPANY, *et al.*

No. 61

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner

v.

SUNRAY DX OIL COMPANY, *et al.*

No. 62

THE BROOKLYN UNION GAS COMPANY, *et al.*

Petitioners

v.

FEDERAL POWER COMMISSION, *et al.*

No. 80

FEDERAL POWER COMMISSION,

Petitioner

v.

STANDARD OIL COMPANY OF TEXAS,
A Division of Chevron Oil Company, *et al.*

No. 97

THE UNITED GAS IMPROVEMENT COMPANY,

Petitioner

v.

SUNRAY DX OIL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GULF OIL CORPORATION, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC., UNION PRODUCING COMPANY, AND CLARK FUEL PRODUCING COMPANY

This brief is filed on behalf of the undersigned producer respondents in Nos. 60, 61, 62, 80 and 97, the *Amerada* cases. We urge affirmance of the judgments of the Court of Ap-

peals for the Tenth Circuit approving the Commission's 16-cent in-line price determination for Texas District No. 4 and reversing the Commission's determination that retroactive refunds could be imposed under validly issued temporary certificates which had become final and contained no provision forewarning of such hidden liability. The issue raised in the *Sinclair* and *Hawkins* cases (Petition No. 143) as to whether a "public need" for acquiring new gas supplies was adequately shown is not present in this case.[1] This brief replies to certain contentions advanced in the initial briefs filed by Brooklyn Union Gas Company, *et al.* (Brooklyn Union) and The United Gas Improvement Company (UGI), collectively referred to as Distributors. Additionally, we respond to the position taken in the initial briefs of the Commission and the Distributors on the retroactive refund issue.

I. THE IN-LINE PRICE ISSUE

Distributors' argument seeking reversal of the Commission's price line determination is that the Commission abused its discretion in considering evidence reflective of "current conditions." Distributors argue that the Commission should have confined itself to evidence found to be limited to a "... few isolated and inherently non-representative sales . . ." (I R. 5784). Acceptance of Distributors' position would require freezing the Section 7 in-line price

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[1] In their brief to the Presiding Examiner in the *Amerada* case, the Distributors stated (page 2):

> "The only contested issues in these proceedings are the initial prices at which the producer sales should be permanently certificated and the refunds which should be ordered of those amounts collected under temporary authorizations in excess of the price at which the sales are permanently certificated."

level for a period of over a decade prior to the establishment of just and reasonable rates for the area in question. Such a total disregard for current realities and the price levels required to obtain adequate new gas supplies for the interstate market is totally inconsistent with the Commission's statutory obligation of determining the price required by the "present or future public convenience and necessity."

The Distributors attempt to support their unprecedented position by: (1) labeling price levels higher than those they have unilaterally determined to be acceptable as "untested and essentially unregulated" (Brooklyn Union Br., pp. 27, 28); (2) ignoring evidence of current conditions demonstrating that a price freeze at in-line levels of the 1950's is inconsistent with the present and future public convenience and necessity; and (3) urging that an artificially low in-line price does not penalize the producer since he can exercise his rights under Section 4 of the Act to file up to his original contract price. We hereafter expose the errors underlying such contentions.

A. The Commission's 16 Cent In-Line Price Does Not Represent An Adoption Of "Unregulated" Market Prices

Distributors characterize the Commission's reliance upon temporarily certificated prices and its *Policy Statement*[2] guideline price as a utilization of "untested" and "essentially unregulated" prices inconsistent with the objectives of in-line pricing. This is entirely misleading. The 16-cent in-line price adopted by the Commission for Texas District No. 4 is substantially *below* the weighted average price level

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[2] *Statement of General Policy No. 61-1*, 24 FPC 818 (1960).

under contemporaneously issued certificates[3] and the 18-cent *Policy Statement* price applicable to the pricing period in question. Moreover, the uncontested evidence shows — and the Commission specifically found — that the *Policy Statement* resulted in an overall reduction in the level of contract prices negotiated by Producers with pipeline purchasers (I R. 5788-89). Hence, such prices cannot be properly characterized as "unregulated."

Distributors' argument is factually incorrect in an additional respect: While the weighted average interstate contract level for the time period in question was in excess of 17.176 cents per Mcf (I R. 5786), the Commission established an in-line ceiling price of only 16 cents per Mcf, a level which the Commission found ". . . draws the line substantially below the average going price for gas in the area" (I R. 5790).

In order that the Court will not be misled by the innuendo prevading the Distributors' brief labeling the Commission's 16-cent in-line price as "potentially excessive," (Brooklyn Union Br., p. 21) we respectfully request the Court to take notice that the Commission, in its *Permian Basin* opinion and order,[4] found the national average current cost of finding and producing gas supplies in 1960 to be 16.43 cents per Mcf (34 FPC 159 at 192). Distributors, however, never explain how a 16-cent in-line price, viewed in this light, can reasonably be labeled "excessive."

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[3] In its brief, Brooklyn Union (p. 10, fn. 4) claims without record citation that the Staff witness who sponsored the price line exhibit (Exhibit 16) "rationalized" the absence of sales below 14 cents because no party was contending for a price line of less than 14 cents and it reduced the "magnitude" of the task of preparing the exhibit. This is flatly refuted by the witness's uncontradicted testimony that he considered those sales irrelevant (I R. 1130).

[4] 34 FPC 159 (1965), pending before the Court in Nos. 90, *et al.*, this Term.

B. The Legal Authorities Relied On By Distributors Do Not Support The Position That Consideration Of "Current Conditions" Is Irrelevant To In-Line Pricing

In support of their position that a consideration of current conditions in the natural gas industry is irrelevant to the present or future public convenience and necessity, Distributors rely upon the D. C. Circuit's opinion in *Sinclair-Hawkins.*[5] The court there held that in-line pricing should not depend upon current conditions ". . . unless, in a particular case, there is something special about these conditions . . ." (373 F. 2d at 829). The "something special" referred to by that court goes directly to the heart of the Commission's decision in this case, *i.e.,* the attraction of the necessary capital prerequisite to the search for adequate new gas supplies. However, Distributors have *excluded* the following pertinent passage from that court's opinion quoted at page 30 of Brookyn Union's brief:

> "For example, in a particular case, the FPC may feel that *an in-line price which is too low subjects the producers to too much risk. And this risk may endanger investment in the industry."*[6]

It is the consumer who is economically injured if the Commission has permitted the supply-demand relationship to become out of balance through the freezing of prices at unrealistically low levels. The responsibility of the Commission to provide consumers with adequate supplies at a reasonable price requires that it have the flexibility to make adjustments to the in-line price levels in response to shifts in conditions and relative excesses or shortages in supply

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[5] *Public Service Commission of New York* v. *Federal Power Commission,* 373 F.2d 816 (D.C. Cir. 1967).

[6] Emphasis supplied unless otherwise indicated.

levels. Such flexibility is not possible under a system of pricing designed simply to freeze price levels established for the 1950's.

The economic and financial requirements evidence proffered by Producers, and summarized in Appendix B to our initial brief, demonstrates in some detail the changing conditions in the industry which required an upward revision in the Commission's prior 15-cent in-line price determination. The Commission excluded this evidence solely on the basis of ". . . the need to expedite the determination of the price line" (Commission Br., p. 27). The Commission, however, concluded that the basic economic forces operating within the industry (which were analyzed in detail by such excluded evidence) were directly reflected in the more generalized price line evidence which it utilized. To the extent the Court may seek greater detail on the shifts in current industry conditions which required the Commission to revise it earlier 15-cent in-line price, we respectfully refer it to the evidence proffered by the Producers.[7] It shows *inter alia*:

1) The U. S. Bureau of Labor Statistics indicate the retail price of natural gas has lagged behind prices of alternative fuels (I R. 1308-09);

2) Reports by the Texas Railroad Commission and the annual reports by pipelines to the Commission demonstrate a sharp decline in the percentage of Texas Gulf Coast gas sold in interstate commerce and a corresponding increase in intrastate deliveries (I R. 1331-32); and

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[7] The exclusion of this evidence is the issue raised by a conditional cross-petition currently pending as No. 82, this Term. Although such evidence has not been printed in the appendix filed in this Court, it does appear in the Joint Appendix and related exhibit volume filed in the court below, copies of which have been lodged with the Clerk and are available to the Court.

3) Statistics regularly published by the American Gas Association and the American Petroleum Institute disclose a steady decline in the ratio of new supplies to net production, particularly in Texas (I R. 1271-72).

Absent the ability to utilize its expertise in analyzing the various price line data received in evidence as a barometer of such trends, the Commission would have been prohibited, short of a more lengthy evidentiary hearing, from responding to such indicia and insuring the maintenance of adequate gas supplies for the expanding consumer market.[8]

C. Rate Increase Filings Under Section 4(e) Do Not Provide Protection From An Unreasonably Low In-Line Price

Distributors also attempt to support their price freeze position by arguing that a producer can escape the inequities of an artificially low initial price through subsequent rate increase filings under Section 4 of the Natural Gas Act (Brooklyn Union Br., pp. 30-31). Distributors fail to mention, however, that the Commission frequently imposes conditions in both temporary and permanent certificates prohibiting rate increase filings above certain levels or during a certain prescribed moratorium period. (See brief of Shell Oil Company, *et al.*, in Nos. 60, *et al.*, 111, and 143, pp. 38-40.) Even assuming that producers were not pre-

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[8] Although it is inconsistent with their basic premise that current conditions are irrelevant in in-line pricing, Distributors claim that the period during which these contracts were executed was "generally accepted" as being one of "excess supply" (Brooklyn Union Br., p. 31, fn. 16). This allegation, presumably designed to justify a price freeze, is not supported by any evidentiary presentation of Distributors. Moreover, it is contradicted by the evidence of record and the economic testimony proffered by Producers which Distributors successfully fought to exclude (I R. 5776).

cluded from filing for increased rates, in the event an artificially low initial price were adopted, they would nevertheless be subjected to the following irreparable losses:

1. Under the notice and suspension provisions of Section 4 of the Act, the producer generally cannot place proposed rate increases into effect for a period of six months after the date of filing. During this period, the amount collected is frozen at the initial price level. In the event the increased rate level is found to be justified, no mechanism is available for recouping the loss incurred during the six-month notice and suspension period.

2. The measure of any refunds of amounts collected under temporary certificates containing a refund condition is not by reference to the eventual just and reasonable rate, but solely to the in-line price established at the time of permanent certification. In such circumstances, if the in-line price is established at an artificially low level, refunds will be required of amounts which in all probability will ultimately be determined to have been just and reasonable. There is no procedure by which such losses can be recouped.

3. The in-line price established for these sales will apply to all amounts collected from March 23, 1964 (the date of the Commission's order below) to date. No rate increase filings under Section 4(e) would be permitted on a retroactive basis covering such period. Combined with the effect of (2) above, adoption of Distributors' 15-cent price freeze position would limit producers to receiving only 15 cents for as long as the first *eight* years of deliveries (covering approximately *one-half* of the committed reserves) with no opportunity to recover the difference between such artificially low price and any higher just and reasonable rate which may ultimately be established.

4. Until such time as a just and reasonable rate is determined (which may be more than a decade after the sale commences), a producer collecting an increased

rate subject to refund has no way of knowing what portion of the increase above the in-line level of permanent certification may ultimately be retained. This uncertainty is, of course, aggravated when the permanently certificated price is set at an artificially low level. Such uncertainty creates substantial problems for the producer in settling with royalty interest owners, state taxing authorities, and other interest owners in his property. Moreover, producing properties are frequently sold or utilized as security in financing new drilling projects. Such a contingent refund obligation creates a substantial restraint upon the alienation of such property and impedes its development.

5. A regulatory procedure which will create contingent refund obligations of this type upon new sales will choke off new investment in gas exploration projects. An investor would have no way of determining the return available from an investment in gas properties compared to the many alternative business opportunities competing for capital funds. The real loser, of course, will be the gas consumer who has a substantial investment in gas appliances and, absent adequate producer investment, will not be able to obtain necessary future gas supplies.

The in-line technique developed by the Commission is a practical solution to a vexing interim problem — the derivation on an expedited basis of appropriate certificating pricing levels for areas in which no just and reasonable area rate yet has been determined. In-line pricing requires balancing the desirability of a full record development of the factors relevant to a price line determination against the necessity for prompt Commission response to changing industry conditions. Under such a procedure, considerable deference must be given to agency expertise if the Commission's findings are supported by substantial evidence. *People of State of California* v. *Federal Power Commission*, 353 F.2d 16, 22 (9th Cir. 1965). The net effect of

Distributors' position is to ask this Court to substitute its judgment for that of the Commission's on a highly complex issue requiring the balancing of many offsetting factors on the basis of an abbreviated record shaped by the demands of expedition. Under such circumstances, judicial restraint is clearly appropriate.

II. THE CONTENTIONS ADVANCED IN JUSTIFICATION OF THE RETROACTIVE IMPOSITION OF REFUND LIABILITIES ARE ERRONEOUS

A. Introduction

The attempts of the Commission and Distributors to justify the retroactive imposition of refund liabilities upon lawful temporary certificate orders proceed from various invalid premises. These are highlighted by the Commission's position that no "rational businessman" should have relied upon its orders issuing temporary certificates (Commission Br., p. 48). Such a contention only impugns the integrity of the administrative process and is contradicted by the finding of the Commission itself in this case that Producers had acted "in justifiable reliance" upon these temporary certificates and that the subsequent imposition of refund liabilities would "so denature the value of a commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (I R. 5305-06). It is astounding that the Commission, particularly in view of the necessity for reliance upon its decisions which fair and effective regulation requires, would affirmatively seek to create such a gigantic credibility gap.[9]

[9] For example, the two-price system adopted by the Commission in its *Permian Basin* decision is premised upon the Commission's express representation that the "new gas" incentive price there established can be relied upon by producers and will not thereafter be reduced, *Area Rate Proceeding*, Docket No. AR61-1, 34 FPC 159, 188 (1965).

Brooklyn Union argues that since the Commission "neglected" to forewarn Producers of the possibility of refunds, it should not be precluded from imposing refunds retroactively (Brooklyn Union Br., pp. 35-36). This is a wholly misleading characterization because the absence of refund conditions in these temporary certificates cannot be attributed to Commission "neglect" when, by its own order of February 5, 1963, the Commission expressly found that "it would be contrary to the public interest, as well as inequitable" to impose refund conditions upon these certificates (I R. 5307).

The Commission and Distributors deliberately ignore the particular circumstances in which these temporary certificates were issued and relied upon. Their briefs are limited to generalizations which have no applicability to the facts of this case. They also ignore the Commission's assurances to both the Producers and Distributors that the temporary certificates in question authorized the collection of firm prices during the period of temporary certification. In our initial brief we have discussed in detail the unlawfulness of the Commission's imposition of retroactive refund liabilities upon Producers' temporary certificates. We here respond briefly to certain contentions of the Commission and Distributors in order to place them in proper context.

B. Substantial Benefits Flow To Pipelines, Distributors And Consumers As A Result Of Temporary Certificates

Distributors claim that temporary certificates are issued by the Commission "... for the *sole function* of 'bailing out' an individual producer from a business emergency ..." (UGI Br., p. 17). This attempt to strip temporary certificates of any public-interest function is merely a collateral attack upon the temporary certificate orders. Under these circumstances, we believe a brief recitation of the need for temporary certification in producer regulation is required.

No participant in the *Amerada* proceeding is contesting the need of the pipelines — and therefore of the ultimate consumers — for the gas sold pursuant to the sales certificated in this proceeding. As temporary certificated sales accounted for fully 90 percent of the gas committed to the interstate consumer during the relevant time period, absent the issuance of temporary certificates, practically all of the new interstate gas from this important supply area would not have flowed into interstate commerce, if at all, until permanent certificates were issued in March of 1964. Thus, deliveries would have been delayed up to three and one-half years from the time the contracts for these admittedly needed supplies had been made with the particular pipelines (I.R. 5306). By making deliveries under the temporary certificates issued, Producers irrevocably dedicated their gas to the interstate market and thereby assured that the public need for the gas would be satisfied and maintained.

Under Section 157.28(c) of the Commission's Regulations, 18 CFR 157.28(c), temporary certificates may be issued upon the applicant's sworn showing of a defined emergency situation. These regulations recognize such situations as drainage, threatened loss of lease and flaring. Basically, UGI contends that these regulations are not in the public interest because the standards do not cover situations "injuring consumers or threatening loss of gas to the interstate market" (UGI Br., p. 8).[10] On the contrary, drainage experienced by a producer may be caused by an offsetting well delivering gas to a nonjurisdictional market. Thus, in the absence of a temporary certificate, the interstate well would remain shut in and the gas would flow to the opened intrastate well and thus be lost to the

[10] However, these regulations were judicially sanctioned in *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893 (D.C. Cir. 1964).

interstate market. This is particularly significant in the Texas Gulf Coast Area where 52 percent of the gas flows under nonjurisdictional contracts (III R. 223). Similarly, gas can be lost to the interstate market in situations where a producer loses his lease because of an inability to market the gas. In such a situation, the producer no longer has property to dedicate to the interstate market. It is also perfectly obvious that the public benefits from the issuance of temporary certificates to prevent flaring or the wasteful burning of natural gas in the atmosphere. Flared gas reaches no market.

The presence of an active and rapidly expanded intrastate market in the Texas Gulf Coast area also brings into focus the interstate consumers' interest in having the interstate market economically competitive with the intrastate market. The failure of the Commission to provide for release from what are acknowledged economic hardships, coupled with the normal regulatory time lag involved in obtaining Commission approval for a sale, would have added to the unattractiveness of the interstate regulated market and would have resulted in producers more actively searching for intrastate markets for their gas rather than waiting approximately three years for permanent certification before being able to sell their product.

C. The Terms Of Temporary Certificate Orders Are Judicially Reviewable And Become Final In The Absence Of Judicial Review

The Commission and Distributors variously contend that temporary certificate orders are not final orders and, therefore, confer no rights upon the certificate holder. These erroneous characterizations are obviously designed to bring the retroactive refund question within the ambit of this Court's decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965) (*Callery*). There, the

Court affirmed the Commission's imposition of refund liabilities upon certain amounts previously collected pursuant to non-final permanent certificate orders which had been nullified as the result of judicial review. In this context, the Court upheld the Commission's action on the ground that an agency "can undo what is wrongfully done by virtue of its order" (382 U.S. at 229). By contrast, however, it cannot properly be contended that the temporary certificate orders at issue and the action taken in reliance upon them are in any way "wrong." These orders are valid orders which have become final as a matter of law.

Brooklyn Union attempts to create the impression that prior to the Commission's *Shelly* decision in 1962 (28 FPC 401), the Commission had made clear that the initial prices authorized by its temporary certificate orders were always subject to retroactive modification upon permanent certification (Brooklyn Union Br., p. 33). The error of this contention is demonstrated by the inapposite FPC decisions cited by Brooklyn Union involving either refund liabilities based upon *specific* refund conditions attached to the temporary certificates,[11] or liabilities arising from the collection of amounts under permanent certificates which had been *invalidated* before becoming final.[12]

It is indisputable that the terms of temporary certificate orders issued by the Commission are judicially reviewable and, in the absence of timely review, these terms become final and binding, *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 156-57 (5th Cir. 1961). Indeed, on review of permanent certificate orders issued to certain producers in *Texaco*, the court of appeals held that it lacked jurisdiction to entertain producers' attack upon the terms of previously

[11] 23 FPC 369, 378 (*El Paso*); 27 FPC 96 (*Continental Oil*).

[12] 26 FPC 532, 27 FPC 347 (*Socony Mobil*); 27 FPC 15, 482-83 (*Texaco - Seaboard, Inc.*).

issued temporary certificates since timely review of the temporary certificate orders had not been sought.

The Commission's order of February 5, 1963 has also become final (I R. 5305-07).[13] In their briefs, neither Brooklyn Union nor UGI even mentions this order which refused to impose refund conditions upon the temporary certificates issued to Producers. The Commission attempts to evade the effect of this highly significant order[14] by now speculating that the purpose of Distributors' motion was merely to seek the "supplemental protection" of the imposition of an explicit refund condition upon Producers' temporary certificates (Commission Br., pp. 40-41, fn. 28). The determinative fact is that the Commission treated it as an application for rehearing of the temporary certificates, requesting either their vacation or the imposition of refund conditions upon them. Thereafter, Distributors chose not to seek judicial review of this definitive order which reaffirmed that the temporary certificates had been issued "without condition as to refund" and had authorized the collection of the initial certificated prices subject only to prospective modification (I R. 5305).[15] Thus, the "upset administrative order" doctrine of *Callery* has no applicability here.

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[13] As previously indicated, however, Producers do not concede that the Commission is empowered to modify temporary certificates after the time for their judicial review has passed (see our initial brief, p. 41, fn. 40).

[14] A similar order issued by the Commission in *J. Ray McDermott*, 28 FPC 1300, was reviewed and affirmed by the District of Columbia Circuit in *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893 (1964).

[15] The fact that the order was issued on the basis of a contested motion did not insulate it from judicial review. This Court's decisions in both *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958), were reviews of F.P.C. orders denying motions. See also *Trans World Airlines, Inc.* v. *C.A.B.*, 339 F. 2d 56, 63 (2d Cir. 1964), *cert. denied*, 882 U.S. 842.

The Commission and Distributors speak as though temporary certificate orders are meaningless except insofar as they permit producers to dedicate their gas irrevocably[16] to the interstate market. This is most misleading. Producers have on various occasions learned to their irremediable detriment that the terms of a temporary certificate are not subject to retroactive change contingent upon the terms of the permanent certificate. Thus, although the Commission and Distributors allude in general terms to those situations where the temporarily certificated price is higher than the price authorized at the time of permanent certification, they fail to mention the cases where the initial price authorized by the temporary certificate is *less* than the price authorized upon permanent certification, *Standard Oil Co. of California*, 27 FPC 1153, 1155, 1161, (1962), aff'd *California Oil Company* v. *Federal Power Commission*, 315 F.2d 652, 654 (10th Cir. 1963); *Shell Oil Co.*, 32 FPC 34, 35, 41 (1964), aff'd, *People of the State of California* v. *Federal Power Commission*, 353 F.2d 16 (9th Cir. 1965);[17] *Texaco Inc., et al.*, 33 FPC 1228 (1965).[18] In those cases, the Commission

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[16] The temporary certificate orders uniformly provide that once service is commenced thereunder, it may not be discontinued without Commission approval. This is in accord with the requirements of Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b).

[17] In the *Shell* case, the temporary rate was fixed at 15 cents per Mcf, but the sales involved were later permanently certificated at 17.7 cents per Mcf (32 FPC at 35).

[18] In the *Texaco* case, the Commission granted 233 permanent certificates to numerous producers, including some of the producers involved in the case-at-bar, authorizing the collection of their initial contract prices inclusive of an upward price adjustment for the Btu content of the gas delivered in excess of 1000 Btu per cubic foot. In general, the upward price adjustment based upon Btu content approximated 2 cents per Mcf. And yet, many of these producers sold their gas under temporary certificates issued several years earlier upon the condition that "the upward Btu price adjustment clause shall be eliminated from the subject gas sales contract." A typical temporary certificate to this effect is attached as Appendix "A" to this brief.

did not undertake to "undo what [was] wrongfully done" by retroactively increasing the temporary certificate rates, nor was it empowered to do so.

As discussed in our initial brief, the temporary certificate orders, issued in implementation of the Commission's *Policy Statement*, and the Commission's order of February 5, 1963 herein are final orders upon which Producers have relied to their detriment. Moreover, these temporary certificates authorizing firm initial prices at levels at or below the applicable *Policy Statement* level were the product of a carefully considered and articulated regulatory policy of the Commission. Significantly, the Commission has never claimed that its retroactive modification of the terms of these temporary certificates constitutes an attempt to correct inadvertent error of a ministerial nature. Its action is nothing more than an effort to give retroactive effect to a newly instituted policy regarding temporary certificates.[19] In this regard, the following language of this Court in *American Trucking Associations, Inc.* v. *Frisco Transportation Company*, 358 U.S. 133, 146 (1958) is controlling:

> "Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies * * *."

The question here is whether the agency here has the power to undo conclusive orders which were not the result of inadvertent error, but rather the implementation of a clearly articulated policy.

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[19] See FPC Order No. 336, 28 F.R. 2844 (1967), 18 C.F.R. § 2.63, which provides for the imposition of express refund conditions upon all temporary certificate orders issued after February 9, 1967.

D. The D. C. Circuit's *McDermott* And *Skelly* Decisions Provide No Lawful Basis For The Commission's Refund Order In This Case

Brooklyn Union and UGI argue that the D.C. Circuit's separate decisions in *McDermott*[20] and *Skelly*[21] should be read in tandem as establishing the law of the Commission's obligation to require refunds in this case (Brooklyn Union Br., p. 34; UGI Br., pp. 11-12).

In *McDermott* the D.C. Circuit reviewed three separate Commission orders[22] granting temporary certificates reducing the proposed prices of 23.675 cents per Mcf to the South Louisiana *Policy Statement* level of 21.25 cents per Mcf.[23] The Commission held there that in granting the temporary certificates at the *Policy Statement* level it had authorized the producer "to sell gas to meet the emergency condition involved while at the same time the consumer is assured of the availability of new sources of gas at stable prices." Additionally the Commission held that by reducing the proposed rates to the *Policy Statement* level, it was permitting the sale, "but only at the price fixed by the Commission as being in the public interest" (28 FPC at 1303). The

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[20] *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893 (1964). "McDermott" is the popular name given to this case because of the title of the Commission's order reviewed by the D.C. Circuit.

[21] *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (1964).

[22] *J. Ray McDermott & Company*, Docket No. CI63-301, 28 FPC 563, rehearing denied 28 FPC 1300; *Placid Oil Company*, Docket No. CI63-305, 28 FPC 565; *E. Cockrell Jr., et al.*, Docket No. CI63-326, 28 FPC 562.

[23] These reductions were expressly ordered pursuant to the Commission's Fourth Amendment to its *Policy Statement*, establishing a 21.25 cent ceiling for new sales in South Louisiana (26 FPC 661).

D.C. Circuit affirmed the Commission because it had been neither arbitrary nor unreasonable (327 F.2d 893, 897).[24] The Distributors' contention is that despite the judicial affirmance of those orders, they are still subject to *retroactive* modification upon permanent certification. If the D.C. Circuit had intended that result, it could not have fairly or even reasonably *affirmed* the Commission's orders.[25]

In *Skelly* the D.C. Circuit faced the refund problem for the first time and concluded that the Commission could order refunds, if the equities in the case so required. In so doing, it expressly noted the conflict of its decision[26] with the prior law established by the Tenth Circuit five years earlier in *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 270 F. 2d 404 (1959). The D.C. Circuit ignored, however, the fact that the Commission itself had expressly determined to follow the *Sunray Mid-Continent* decision by issuing temporary certificates with conditions of "such certainty as to allow the exercise of choice." *Area Rate Proceeding,* 29 FPC 223 at 225 (1963); *Amerada Petroleum Corporation,* 29 FPC 218 at 220 (1963). *Sunray Mid-Continent* did not preclude the imposition of conditions upon temporary certificates. Rather, it required that if conditions

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[24] This was in accord with the Fifth Circuit's decision in *American Liberty Oil Co.* v. *F.P.C.*, 301 F.2d 15 (1962), holding that an adequate basis existed to condition a temporary certificate to the applicable *Policy Statement* level.

[25] By contrast, where the Commission's certificate orders have been set aside on judicial review, the Commission has successfully argued that because they were judicially invalidated, refunds could be ordered, *U.G.I.* v. *Callery Properties, Inc.*, 382 U.S. 223. In this case, the Commission is seeking the additional power to order refunds although its orders became final in the absence of judicial review. The Distributors' interpretation of *McDermott* suggests that the Commission could order refunds even where the Commission's orders are judicially affirmed.

[26] 329 F.2d at 250, fn. 8.

were to be imposed upon temporary certificates, the Commission must do so at the time of their issuance and in such terms as to permit the producer to make an intelligent choice whether to accept or reject the proffered certificate. This Court recognized in *CATCO* the producer's right to reject conditional certificates (360 U.S. at 387-88). But if certificates may be conditioned after acceptance and on a retroactive basis, a clear case of entrapment results (see I R. 5306) and the producers' right to a choice between acceptance or rejection is a sham.

In *Skelly*, the D.C. Circuit concluded that the Commission could, under Section 7, retroactively impose refund obligations because "[i]t would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it" (329 F.2d at 249). This erroneously *assumed* an affirmative grant of power to take retrospective action because there was no statutory prohibition. This Court has held, however, that a "retrospective operation will not be given to a statute * * * unless such be 'the unequivocal and inflexible import of the terms and the manifest intention of the legislature,' " *Union Pacific Railroad Company* v. *Laramie Stock Yards Company*, 231 U.S. 190, 199 (1913). By contrast, Section 4 of the Natural Gas Act affirmatively empowers the Commission to adjust suspended rates retroactively, but it cannot be said, in the absence of an "unequivocal" and "manifest intention," that Congress granted the Commission such a retroactive power under Section 7 of the Act.

In the absence of an affirmative grant of power to take retroactive action under Section 7, we respectfully submit that no such power can be implied. Although the Commission argues that there is "no statutory bar" to the imposition of retroactive refunds under this Section, it cites this Court's *Callery* decision in support (Commission Br., p. 41). However, the Commission's power to impose refunds in

that case did not derive from Section 7. In *Callery*, the rates which the Commission had initially authorized had been judicially invalidated. This Court expressly agreed with the Fifth Circuit that in such situation the Commission has an "inherent power" (335 F.2d at 1019) to undo the wrong caused by its illegal order. Thus, this Court rested its decision upon an agency's inherent power to correct an invalid order, but not upon holding that Section 7 of the Natural Gas Act authorizes the retroactive modification of a valid order which has become final.

E. The Question Of The Commission's Exercise Of Its Asserted Retroactive Refund Power In *Amerada* Opinion No. 501 Is Prematurely Raised

The Commission and UGI contend that the Court should also now review the reasonableness of the exercise of the Commission's claimed power to impose retroactive refund liabilities upon Producers. As demonstrated in this and our initial briefs, we dispute that the Commission possesses such power. In any event, the many legal and equitable issues raised in the subsequent appeal of the Commission's Opinion No. 501 should not be entertained by this Court at this time.

After Producers filed their individual petitions for review of Opinion No. 501 (*i.e.*, the exercise of the claimed refund power), the many issues raised by those review petitions were not even briefed, much less passed upon by the Tenth Circuit. Indeed, when that court summarily disposed of these appeals on the basis of its prior *Sunray DX* decision (370 F.2d 181), there was nothing before it except the review petitions themselves and the Commission's "Certificate of Record in Lieu of Record."[27]

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[27] This latter compilation was not the record before the Commission, but constituted merely a listing, by title only, of the various pleadings, documents, and orders relating to Opinion No. 501.

In these circumstances, it is no wonder that the Tenth Circuit did not undertake a review of the many subsidiary questions relating to the reasonableness of the Commission's exercise of its claimed refund power. First, the Tenth Circuit held that "[b]ecause we believe that the Commission lacks such power, we are not concerned with the exercise of the power" (376 F.2d at 580). The Tenth Circuit also noted that "[t]he Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue" in the interest of prompt disposition of the power question raised by its petition for certiorari to this Court in No. 60, this Term (376 F.2d at 581). This representation was undoubtedly an important reason for the Tenth Circuit's summary disposition of the review petitions. The Tenth Circuit did not refuse to review the substantive questions raised by Producers, but noted rather that if it be held that the Commission does possess such power, "we are ready to consider then the manner of the exercise of the power" (376 F.2d at 581). In similar circumstances, the Court has often recognized the advantage of a prior disposition of a substantive issue of this type by the intermediate appellate court, especially in the case of judicial review of administrative decisions. For example, the Court held in *Civil Aeronautics Board* v. *American Air Transport, Inc.*, 344 U.S. 4, 5 (1952):

> "* * * This Court does not normally review orders of administrative agencies in the first instance; and the Court does not desire to take any action at this time which might foreclose the possibility of such review in the Court of Appeals."[28]

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[28] In its recent decision in *F.P.C.* v. *United Gas Pipe Line Company, et al.*, 386 U.S. 237 (1967), this Court reaffirmed that it does not consider it appropriate to decide in the first instance

It should also be stressed that review, in the first instance, by this Court of the many questions relating to the exercise of the claimed refund power will not result in refunds being made in the near future. By its Opinion No. 501, the Commission specifically ordered the Producers to retain or place in escrow the amounts ordered to be refunded (II R. 6228) in recognition of the need for further proceedings before the Commission concerning the question of a flow-through by the pipeline purchasers of the refunds imposed upon Producers. See *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 357 F. 2d 352 (5th Cir. 1966); *United Fuel Gas Co.* v. *Federal Power Commission,* 367 F. 2d 34 (4th Cir. 1966).

Importantly, the principal authority cited by the Commission in support of Opinion No. 501 is its *Skelly* Opinion No. 492[29] issued on remand from *Public Service Commission of New York* v. *F.P.C.,* 329 F. 2d 242 (D.C. Cir. 1964). But Opinion No. 492 is now pending before the court of appeals following briefing and argument on the various petitions seeking review of the Commission's exercise of its claimed refund power in that case, *Skelly Oil Company, et al.,* v. *Federal Power Commission,* Nos. 9000, *et al.* (10th Cir.). With the agreement of the Solicitor of the Commission, the court is withholding its decision in the *Skelly* appeals abid-

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an issue "to which the Court of Appeals has not addressed itself" (386 U.S. at 247). See also: *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.,* 337 U.S. 265, 285 (1949); *Abbott Laboratories, et al.* v. *Gardner,* 387 U.S. 136, 156 (1967). *Cory Corporation, et al.* v. *Sauber,* 363 U.S. 709, 712, (1960); *Salem* v. *United States Lines Company,* 370 U.S. 31, 38 (1962); and *United States* v. *Republic Steel Corporation,* 372 U.S. 482, 493 (1960).

[29] *Skelly Oil Co.,* 35 FPC 849 (1966).

ing the outcome of the instant litigation involving the resolution of the basic threshold question of the Commission's power.[30]

In these circumstances, this Court should not undertake review of the Commission's exercise of its claimed refund power in its Opinion No. 501 at this time.

F. The Commission's Exercise Of Its Claimed Retroactive Refund Power Is Not Supported By Substantial Evidence And Constitutes An Abuse Of Discretion, Assuming *Arguendo* That Such Power Exists

Assuming that the Court should decide to review the question of the Commission's exercise of its claimed refund power in its present inchoate form, it must necessarily examine all of the issues raised by the Producers in their petitions for review of Opinion No. 501 filed below.[31] The following are the major issues raised by these eleven separate petitions:

1. Whether the Commission improperly denied Producers the opportunity to present the following evidence demonstrating that the retroactive imposition

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[30] The underlying factual questions concerning the Commission's exercise of the refund power in its *Skelly* Opinion No. 492 are not identical with those present in the instant litigation. It is reasonable to assume, however, that the court of appeals' review of Opinion No. 492 will be beneficial to the expeditious resolution of issues raised by Producers on review of Opinion No. 501, if that question is ultimately found to be relevant.

[31] These petitions were lodged in this Court by the Solicitor General with the filing of the Petition in No. 80, this Term.

of a refund condition on the sales at issue is contrary to the public convenience and necessity:[32]

a. The extent to which Producers relied upon the unconditioned temporary certificates granted by the Commission in determining whether to dedicate their gas to interstate commerce.

b. The impact upon Producers of requiring retroactive refunds.

c. The effect of the Commission's action upon the producing industry from the standpoint of planning, budgeting and financing future drilling and production activities.

d. The extent to which such refunds would actually reach the ultimate consumer.

2. Whether the Commission's conclusion that refunds should be required can be justified in light of its acceptance as fact of the following allegations:

a. that the ordering of refunds will have a substantially adverse effect upon the ability of natural gas producers to assure consumers of an adequate supply of natural gas.

b. that a substantial portion of the monies ordered to be refunded will never reach the ultimate consumer.

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[32] When the Commission announced its intention to consider the possible imposition of retroactive refund obligations, Producers promptly moved for an evidentiary hearing in order to demonstrate the adverse effects which any such refunds would have upon the producing industry and consumers (II R. 5921). Despite the directive of the D.C. Circuit in *Skelly* for the Commission to make "a broader and more penetrating analysis" of the refund issue (329 F.2d at 250), Producers' motions for an evidentiary hearing were summarily denied. The Commission's refund order in Opinion No. 501 is based solely upon the representations contained in briefs filed by the interested parties and is entirely unsupported by any record evidence.

c. that the costs of making these sales exceeded the revenues received under the unconditioned temporary certificates.[33]

While the Commission purports to have accepted these proffered presentations at "face value" (II R. 6227), there is no rational connection between the Commission's acceptance of the facts contained in these presentations (which served to demonstrate the inequity of ordering refunds) and the Commission's ultimate conclusion that the public convenience and necessity requires that refunds be made. See *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 at 167-168 (1962). On the other hand, the Commission can cite no evidence in support of its refund imposition. Rather than answer the presentations made by the Producers, the Commission now contends that the Producers only claimed "detriment, in the large, and without particularization of the facts" (Commission Br., pp. 47-48), and, therefore, cannot complain that refunds were ordered.[34]

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[33] One of the Producers, for example, offered to present evidence to demonstrate, among other things, that the imposition of retroactive refund liabilities upon his sale in question would result in confiscation of his property. This was supported by a cost-of-service presentation related to the operations of this particular producer during 1960. (II R. 6493). This basic constitutional question, raised as a reason against the imposition of retroactive refund liabilities, was not even mentioned, much less evaluated, by the Commission in its Opinion No. 501. Certainly, claims of this nature should be passed upon by the court below in the first instance, especially in light of the Commission's total disregard of such claim.

[34] The Commission suggests that because Producers argued, *inter alia,* that a retroactive repricing of gas sold under temporary certificates would greatly damage the producing industry there was no showing of individual harm. This is rank sophistry, because, as the Commission well knows, its refund orders did have an industrywide impact because virtually all companies operate some sales under temporary certificates. Producers did contend that refund orders would directly affect industrywide

The Commission also contends that the Producers accepted their temporary certificates and relied on the authorized prices only to the extent of paying state production taxes and landowner royalties. This facile argument ignores the fact that Producers relied upon the terms of the unconditioned temporary certificates to collect the price authorized, and not simply as limited authorizations to pay taxes and royalties. The Commission recognizes that taxes and royalties paid in reliance on the unconditioned temporary certificates should not be refunded because those payments were made "in light of the Commission's previous holdings, that *no* refunds would be ordered" (Commission Br., p. 47; emphasis added). This amounts to saying that a limited reprieve from liability is fair and equitable because of the Commission's many assurances that there would be *no* liability at all.

This contention may be compared to the case of an individual who receives a monthly salary and is later told that he must refund a substantial portion of it, except for the taxes he has paid on that salary — in short — that he could rely on his salary to pay taxes, but should not have relied upon it for the payment of the mortgage, the food bills and the car payments. The Commission contends that since the individual Producer did not trace the outgo of its gas revenues to the payment of particular costs (other than taxes

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"planning, budgeting and financing future drilling and production activities" because the individual members of the industry would be harmed (II R. 5925). The Commission contends that since Texaco and Humble had *de minimis* refund liabilities in *this* case, their arguments should be ignored. This is unworthy nipping that ignores the precedent flowing from *this* case to sales in other areas involved in other cases. If the Commission had been truly interested in the effect of this retroactive change in policy on producer activities, it would have convened the hearing requested by the Producers in this case.

and royalties), it should not be heard to complain.[35] Briefly, the Commission unreasonably contends that Producers could rely on their temporary certificates to pay taxes and royalties, but should not have relied upon them to pay salaries, operating expenses, drilling expenses, interest, etc.

Although we do not believe that it would be appropriate for the Court to review the Commission's exercise of its claimed refund power in the circumstances, we respectfully submit that its imposition of retroactive refund liabilities upon Producers is erroneous as a matter of law and equity.

[35] The Commission, of course, refused to hear either group or individual cost evidence and is now using the absence of such evidence against the Producers.

III. CONCLUSION

For the reasons stated here and in our initial brief, the judgments of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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January 8, 1968

APPENDIX A

Address all communications
to the Secretary
FEDERAL POWER COMMISSION
Washington 25

Docket No. CI61-992
Sun Oil Company — Feb. 3, 1961

AIRMAIL

Sun Oil Company
1608 Walnut Street
Philadelphia 3, Pennsylvania

Attention: Mr. Charles E. Webber
Director of Natural Gas Administration

Gentlemen:

Temporary authority is hereby issued to Sun Oil Company to sell natural gas for resale in interstate commerce to Michigan Wisconsin Pipe Line Company as proposed in Docket No. CI61-992, subject to the following conditions:

(1) That the upward Btu price adjustment clause shall be eliminated from the subject gas sales contract.
(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above.
(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

Your related proposed rate schedule will be considered accepted for filing upon compliance with the above conditioned authorization to be effective on the date of initial delivery subject to the provisions of Sections 154.94 (c) and 154.101 of the Commission's regulations under the Natural Gas Act.

The rate schedule has been designated as follows:

Description		*Designation*
		Sun Oil Company
Contract	11-1-60	FPC Gas Rate Schedule No. 130
Letter	11-1-60	Supplement No. 1 thereto

Docket No. CI61-992
Sun Oil Company

Please advise the Commission of the date of commencement of deliveries under such rate schedule making reference in your communication to the rate schedule as designated above.

In addition, please advise the Commission as to whether you would accept permanent certificate authorization under the condition specified in (1) above. Such acceptance may permit disposition of the subject application under the abridged hearing procedure provided no protests or petitions to intervene in opposition to the application are filed.

This authorization and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

/s/ J. H. Gutride
Secretary

cc: Michigan Wisconsin Pipe Line Company
3750 Penobscot Building
645 Griswold Street
Detroit 26, Michigan

Mr. Glen D. Hughes
Sun Oil Company
P. O. Box 1348
Tulsa, Oklahoma

Mr. H. D. Coe
Sun Oil Company
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Washington 6, D.C.

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IN THE

Supreme Court of the United States

October Term, 1967

Nos. 60, et al.

FEDERAL POWER COMMISSION, *et al., Petitioners*

v.

SUNRAY DX OIL COMPANY, *et al., Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR PAN AMERICAN PETROLEUM CORPORATION

Pan American Petroleum Corporation (Pan American or Movant herein) is a Respondent in Nos. 227 and 415, this Term, cases in which the sole question is whether the Federal Power Commission (Commission) has power to order retroactive refunds under unconditioned temporary certificates. Because of the critical interest of Movant in this single issue, it respectfully moves[1] for leave to file a brief *amicus curiae* pursuant to Rule 42 of the Rules of this Court. Such a brief *amicus curiae,* annexed hereto, is limited to one phase of the retroactive refunds

[1] Movant contacted all parties in Nos. 60-62, 80 and 97 and sought, but could not obtain, unanimous consent to file the attached brief *amicus curiae.*

issue before the Court in Nos. 60-62, 80 and 97,[2] this Term — the effect of earlier, contrary "declared law" on an assumed[3] power in the Federal Power Commission to order retroactive refunds. The question considered in the brief *amicus curiae* may be summarized as follows:

> Assuming *arguendo* the validity of *Skelly*[4] — a Court of Appeals decision handed down on January 23, 1964 — is the Commission nevertheless prohibited from ordering retroactive refunds pursuant to that case in the instance of unconditioned temporary certificates issued prior to January 23, 1964, when the contrary "declared law" of *Sunray Mid-Continent*[5] prevailed and was in force?

This question requires an affirmative answer. In support of the instant Motion, Movant respectfully states as follows:

I

It is a virtual certainty that resolution of the retroactive refunds issue before the Court in Nos. 60, *et al.*, will be disposi-

---

[2] The threshold question of power to order retroactive refunds is present in Nos. 60-62, 80 and 97, while in Nos. 80 and 97 the question regarding the manner of exercise of this power may be reached if the Court finds that this power actually resides in the Commission. The retroactive refunds issue is not before the Court for review in Nos. 111, 143, 144 and 231, the remaining related, consolidated cases before the Court.

[3] While the attached brief *amicus curiae* assumes for the sake of argument that the Commission possesses the power to order retroactive refunds under unconditioned temporary certificates, there is no intention here to concede in any other respect that such plenary power has been arrogated to the Commission. *Cf. Public Service Commission of New York v. Federal Power Commission*, the *Skelly* case, cited below.

[4] *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242 (CADC, 1964), *cert. denied*, 377 U.S. 963 (1964), known as the *Skelly* case.

[5] *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959).

tive of the identical issue in Movant's cases. At issue are retroactive refunds of more than $500,000.00 which Petitioners seek to impose on Movant in Nos. 227 and 415. The nature of Movant's interest in Nos. 60-62, 80 and 97 therefore involves a substantial monetary concern which is rooted in the resolution of the retroactive refunds issue.[6]

II

Although the "declared law" issue is equally applicable in Nos. 60-62, 80 and 97, this aspect of the retroactive refunds question was not developed in briefs to the Court of Appeals, and was not considered in the respective Court of Appeals decisions regarding Nos. 60-62,[7] and Nos. 80 and 97.[8] Movant, on the other hand, briefed and also argued "declared law" in the Court of Appeals.[9] Significantly, the decision below in Nos. 227 and 415 was responsive to this presentation, and the Court of Appeals recognized the doctrine of "declared law" in meeting contentions which, in the Court's language, would cause " . . . a turning away from years of Commission assurances and from what was believed to be settled judicial interpretation" and

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[6] Reference is also made to the annexed brief *amicus curiae*, for further information concerning Movant's interest.

[7] *Sunray DX Oil Company, et al. v. Federal Power Commission*, 370 F. 2d 181 (CA 10, 1966).

[8] *Standard Oil Company of Texas, et al. v. Federal Power Commission*, 376 F. 2d 578 (CA 10, 1967).

[9] The "Brief for Petitioner" of Pan American Petroleum Corporation, Case Nos. 7912 and 7962, United States Court of Appeals for the Tenth Circuit, covered this argument on pp. 24-26. Counsel for Pan American also argued the "declared law" doctrine before the Court of Appeals.

violations of "fundamental notions of due process." *Pan American Petroleum Corporation, et al. v. Federal Power Commission,* 376 F. 2d 161, 172 (CA 10, 1967).

III

The relevance of the "declared law" issue is manifest, since it may be decisive in the resolution of the retroactive refunds issue in the consolidated cases and in Nos. 227 and 415. Movant anticipates, moreover, that the "declared law" doctrine will not be considered in any other brief. Movant believes, therefore, that its brief *amicus curiae* will contribute greatly to a full and adequate understanding of the retroactive refunds issue in the consolidated cases.

WHEREFORE, for the foregoing reasons, Movant respectfully moves for leave to file the attached brief *amicus curiae* in the consolidated cases.

Respectfully submitted,

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By:

December 11, 1967

IN THE

Supreme Court of the United States

October Term, 1967

Nos. 60, et al.

FEDERAL POWER COMMISSION, *et al., Petitioners*

v.

SUNRAY DX OIL COMPANY, *et al., Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF PAN AMERICAN PETROLEUM CORPORATION

I. INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the motion to which this Brief is attached. Further information concerning this interest appears in the Argument, below.

II. QUESTION PRESENTED

The sole question presented in this brief *amicus curiae* may be stated in general terms as follows:

> Assuming *arguendo* the existence of power in the Federal Power Commission to order retroactive refunds under unconditioned temporary certificates, is the Commission nevertheless prohibited from exercising such power, when, at the time temporary certificates were issued, a contrary "declared law" regarding the Commission's power prevailed and was in force?

Or, putting this same question in more concrete terms, it would be stated as follows:

> Assuming *arguendo* the validity of *Skelly*[10] — a Court of Appeals decision handed down on January 23, 1964 — is the Commission nevertheless prohibited from ordering retroactive refunds pursuant to that case in the instance of unconditioned temporary certificates issued prior to January 23, 1964, when the contrary "declared law" of *Sunray Mid-Continent*[11] prevailed and was in force?

The position of *amicus curiae* (hereafter called "Movant") is that an affirmative answer must be given to both versions of this one question.

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[10] *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242 (CADC, 1964), *cert. denied*, 377 U.S. 963 (1964).

[11] *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959).

III. STATEMENT OF "DECLARED LAW" DOCTRINE

The Commission found that it had the power to order refunds under the wholly unconditioned temporary certificates at issue in Movant's cases and in Nos. 60-62, 80 and 97. Such Commission action was grounded in *Skelly, supra,* which Movant believes is an erroneous appraisal of Commission power. However, even if *Skelly* represents the correct view of Commission power — that the Commission as a general matter may exact refunds in the absence of an explicit warning condition in the temporary certificate — such power must be limited and restricted to *prospective* exercise only, *i.e.,* to the ordering of refunds under temporary certificates issued *after* January 23, 1964, the date of the Court of Appeals decision in *Skelly,* when *Skelly* changed the pre-existing "declared law" of *Sunray Mid-Continent, supra.* Assuming *arguendo* the correctness of *Skelly,* the change in "declared law" effected by that case may not be applied retroactively to temporary certificates issued *before* January 23, 1964, under the aegis of pre-existing law expressed in *Sunray Mid-Continent.*

IV. RATIONALE OF "DECLARED LAW" DOCTRINE

The retrospective application of *Skelly* by the Commission transgresses fundamental concerns with fairness and due process of law in administrative practice, and the court below so held. The requirement of due process of law protects parties who committed their gas to the regulated market in reliance upon repeated assurances from the Commission, amplified by *Sunray Mid-Continent,* concerning the evident absence of refund liability. This protection continues even though, some years later, the Commission seeks to repudiate these assurances by applying *Skelly* retroactively, belatedly concluding that *Sunray Mid-Continent* was wrong.

Aside from the requirement of due process of law, the retroactive application of *Skelly* cannot stand here. The application of *Skelly* to past conduct in other proceedings, as attempted by the Commission in the instant cases, amounts to a grave abuse of agency discretion. Factual analysis shows that the Commission has not met standards that are required to achieve sound, reasonable regulation. Here, the impact and real meaning of employing *Skelly* retroactively is expressed in terms of arbitrary, capricious, and unlawful action by an agency in flagrant abuse of its discretion.

V. SUMMARY OF "DECLARED LAW" ARGUMENT

A. Movant's temporary certificate was issued as a "no refund condition" instrument, without predicate for the ordering of refunds during the period of temporary authority. This was abundantly clear from existing construction, revealed by administrative holdings and the *Sunray Mid-Continent* decision. In reliance upon its "no refund condition" temporary certificate, Movant committed its gas to the regulated market, justifiably considering its gas receipts to be free from refund obligation. Movant relied upon existing "declared law" concerning the nature of its temporary certificate, and incurred exploration, production, and other expenses on the strength of firm revenues.

It was only in December, 1962, when a motion was filed to subject Movant's temporary certificate to refund conditions, that any serious question arose concerning Movant's refund liability. The Commission denied this motion on February 5, 1963, holding that receipts under the temporary certificates there at issue were firm and not subject to refund obligation.

Less than one year after the decision of February 5, 1963, the Court of Appeals handed down the *Skelly* decision on January 23, 1964. The *Skelly* decision was the first precedent for the ordering of refunds under unconditioned temporary certificates, but it did not decide the major question of whether any later change in "declared law" as expressed in *Skelly* must be limited to prospective applicability only, *i.e.,* to temporary certificates issued after the date of that decision.

The Commission, on July 23, 1964, on the basis of *Skelly*, found in Opinion No. 436 that it had the power to order refunds under Movant's unconditioned temporary certificate.

The Court of Appeals reversed the Commission, holding that the Commission lacked the statutory power to order refunds; the Court, in addition, held that the application of the later "declared law" of *Skelly* to Movant would violate "fundamental notions of due process." *Pan American Petroleum Corp., supra,* 376 F. 2d at 172.

B. In the early days of our jurisprudence, it was conceived that tribunals did not have the power to deny retroactive effect to their decisions. But this restriction on power no longer exists; for it is well settled that the forum is not so limited. There is thus no requirement that new "declared law" overruling a previous holding must be applied retroactively. *Linkletter v. Walker,* 381 U.S. 618 (1965); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *Warring v. Colpoys,* 122 F. 2d 642 (CADC, 1941).

Indeed, to prevent injustice or a denial of due process of law in other proceedings, not only *may* the tribunal restrict the retroactive effect of the new "construction," but in the proper case it is *obligated* to do so. See, in addition to other cases cited, *Linkletter v. Walker,* 381 U.S. at 636; and *Chicot County Drainage* District v. Baxter State Bank, 308 U.S. at 374.

The *Chicot County* doctrine extends to administrative actions

taken under Federal Statutes. Where grave injustice or a denial of due process in other proceedings would result from retroactive application of the administrative action, the new construction must be confined to prospective effect. See, *e.g., Safarik v. Udall,* 304 F. 2d 944 (CADC, 1962), *cert. den. sub nom. Hansen v. Udall,* 371 U.S. 901 (1962); and *NLRB v. International Brotherhood of Teamsters,* 225 F. 2d 343 (CA 8, 1955).

The "declared law" doctrine applies fully to administrative action taken by the Federal Power Commission under the Natural Gas Act. See, *e.g., City of Chicago v. Federal Power Commission,* No. 19,604 (CADC, September 8, 1967). In *City of Chicago, supra,* the Commission expressly overruled previous decisions regarding the proper depreciation allowed pipelines under the Natural Gas Act, but applied this new holding with prospective effect only. The Court of Appeals expressly approved this treatment and held that the Commission thereby observed basic due process concerns of fairness and justice.

C. The Commission, in related refund orders pertaining to unconditioned temporary certificates, recognized the existence of the general problem presented by the change in "declared law" effected by *Skelly.* However, this recognition was limited to certain relatively minor sums involving royalties and production taxes; the real meaning and effect of the refund orders, therefore, was to treat *Skelly* as having been in effect, continuously, from the issuance of temporary certificates, forward. The refund orders ignored all that happened prior to *Skelly;* they ignored the prior "declared law" revealed by *Sunray*

Mid-Continent; they ignored the unambiguous, contrary Commission decision of February 5, 1963.

The correct application of the cited authorities demands that *Skelly* be applied prospectively only, *i.e.,* to temporary certificates issued after January 23, 1964. There can be no warrant for ordering any refunds whatever under unconditioned temporary certificates issued prior to the date that the changed "declared law" of *Skelly* was spoken by the Court of Appeals. The "interest of justice" would be subverted and due process of law transgressed by applying *Skelly* to Movant's temporary certificate.

The practical effect of Movant's argument would not have wide application in other proceedings. *Skelly,* assuming *arguendo* its correctness, would apply to the temporary certificates in that case and to all other temporary certificates issued after January 23, 1964. There would be but a restricted number of existing temporary certificates to which Movant's argument could apply.

Moreover, the potential refund period to which Movant's argument pertains is a relatively brief period, running from the date of initial deliveries to the date of issuance of permanent certificates. This is simply a non-recurring, "locked-in" period of potential refund liability.

D. The "declared law" doctrine must be applied here. The producers and pipelines relied upon their unconditioned temporary certificates and expended funds in reliance thereon. Previously, in its order of February 5, 1963, the Commission found it would be contrary to the public interest to engraft

refund conditions on unconditioned temporary certificates; the Commission unequivocally refused to sanction entrapment. The reasoning in the Order of February 5, 1963, is no less pertinent today.

The application of the "declared law" doctrine here will have no untoward effects for the future. The industry is "on notice" of *Skelly* as to unconditioned temporary certificates issued after January 23, 1964. In all events, the Commission has eliminated the instant problem by requiring the inclusion of *express* refund conditions in all new temporary certificates.

Changes in interpretation are inevitable in the administrative process, but an absence of restraint in retroactive decision-making will over the long term impair administrative flexibility.

The considerations advanced with respect to price stability and reliance for business planning purposes are important to the gas industry. While the gas producer must recognize the pricing risks inherent in his regulated activity, he should be able at any given time to assess the risk on the basis of written Commission orders in the context of the "declared law" then prevailing. The alternative is chaos and confusion in the agency and industry alike.

VI. "DECLARED LAW" ARGUMENT

A. Introduction

Movant and other producers in Nos. 227 and 415 were issued unconditioned temporary certificates over a period of several years, ending in 1962, and, during this entire period, these unconditioned authorizations by virtue of commission interpretation were indisputably "no refund condition" documents, without predicate, under the law, for the ordering of refunds for deliveries of gas made prior to the date of permanent certification.[11] See *Coastal Transmission Corp.*, 26 FPC 677, 683 (1961); *Skelly Oil Co.*, 28 FPC 401, 413 (1962), 28 FPC 1065, 1069 (1962); *Placid Oil Co.*, 30 FPC 283, 293 (1963); *Amerada Petroleum Corp.*, 31 FPC 647, 674 (1963); and *Union Texas Petroleum*, 32 FPC 279, 315-316 (1964). Contemporary judicial authority was no less clear.

Thus, in *Sunray Mid-Continent*, decided in 1959, the producer was tendered a temporary certificate expressly drawn "subject to *any* conditions with respect to price which the Commission may lawfully impose in issuing a [permanent] certificate of public convenience and necessity in this Docket." 270 F. 2d 404 at 407-408 (emphasis supplied). The producer-applicant

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[11] As early as 1955, the Commission issued a permanent certificate to an independent producer at a lower price than was provided in its precedent temporary certificate; however, the Commission did not seek to impose refunds for deliveries made under temporary authority. *Cities Service Gas Company*, 14 FPC 134 (1955), aff'd. *sub nom., Signal Oil and Gas Company v. Federal Power Commission*, 238 F. 2d 771, 773 (CA 3, 1956), *cert. den.*, 353 U.S. 923 (1957).

was also required to indicate its willingness to file a bond to assure the eventual refund of receipts down to whatever price level was finally determined to be proper when permanent certification occurred.

The Court in *Sunray Mid-Continent* held that, while the Commission had broad power under Section 7(e) of the Natural Gas Act to condition temporary certificates, such broad power was by no means an absolute power; the conditional acceptance of a certificate application "must be in accord with the provisions of the Act and must meet the test of constitutional due process." The Court held that the producer-applicant under Section 7 of the Act "has the free choice to accept or reject" a temporary certificate tendered by the Commission, and that he has the right:

> " . . . to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond'." (270 F. 2d at 409).

The Court proscribed this indefinite, speculative approach of the Commission which sought to impose an uncertain, "floorless" rate under the temporary certificate, and, accordingly, ruled that the Commission was required to take action upon requests for temporary certificates "with such certainty as to allow the exercise of choice." Certainty and definiteness were set as criteria limiting the Commission's broad discretion to condition temporary certificates. Indeed, these two requirements must be satisfied be-

fore the Commission's action "meet(s) the test of constitutional due process." 270 F. 2d at 409.

When actually tendered to the producer in, and as a part of the temporary certificate, an express condition of the type under review in *Sunray Mid-Continent* is invalid because it does not meet the criteria of certainty and definiteness. Such a condition is invalid, *a fortiori,* when, as here, it is imposed by the Commission by implication and with retroactive effect, to modify the terms of the original temporary certificate upon which the "exercise of choice" to submit to regulation was based.

In reliance upon its "no refund condition" temporary certificate, Movant accepted such authorization, commenced deliveries of gas in interstate commerce and thereby committed its natural gas reserves to the regulated market.[13] From the standpoint of contemporary law, Movant was fully justified in considering all of its receipts to be firm and free from refund obligation. From the standpoint of public statements by Commission officials, Movant was no less reassured.[14] Accordingly, royalties were paid on the basis of the prices set forth in the temporary certificate.[15]

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[13] Once having commenced deliveries in interstate commerce, the producer may not cease deliveries of gas without the permission of the Commission. See Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b).

[14] Joseph C. Swidler, while Chairman of the Commission, stated in an address to the American Petroleum Institute on November 15, 1961, that temporary certificates without refund condition were intended to "authorize initial sales on a firm basis" so that "producers may know that all of the new initial price is theirs to keep . . . "

[15] Individual, fractional royalty interests, although involving large sums in the aggregate, often each involve relatively small amounts which cannot justify efforts directed to collection of "excess" sums paid out by the producer.

Movant also relied upon existing law and the unconditioned nature of its temporary certificate in planning, budgeting and financing its exploration, development and production activities.[16] Drilling and operating expenses were incurred in reliance upon the contemporary construction that no contingency as to price was involved. Income and other taxes measured by receipts were paid on the basis of firm receipts from gas sales.

Only in December, 1962, when certain intervenors filed a motion to impose refund conditions on Movant's unconditioned temporary certificate, did any serious contention arise concerning the existence of potential refund liability on the part of Movant. This motion, and the novel contention presented thereby, were dispatched by the Commission on February 5, 1963,[17] without ambiguity or equivocation, on the basis of current administrative policy and existing law "declared" by *Sunray Mid-Continent.* The Commission, in *Area Rate Proceeding, et al.,* Docket No. AR61-2, *et al.,* Order Denying Motion to Impose Price Conditions in Temporary Certificates, 29 FPC 223 (1963), stated as follows:

> "Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. *This*

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[16] Movant was not required to, and did not in fact, report receipts under its unconditioned certificate as collected subject to potential refund obligation. Compare the reporting procedures required by Section 4(e) of the Natural Gas Act, 15 USC 717c(e); see in this regard Section 154.102(c) of the Commission's Regulations Under the Natural Gas Act, 18 CFR 154.102(c).

[17] A similar order, also issued on February 5, 1963, affects sales in Nos. 60, *et al.;* refer to *Amerada Petroleum Corporation, et al.,* Docket No. CI62-1544, *et al.,* Order Denying Motion to Impose Price Conditions in Temporary Certificates, 29 FPC 218 (1963).

> *we will not do.* * * * Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced the producers *to dedicate their gas to market upon one set of conditions, and then imposing more stringent conditions upon them.* Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company v. F.P.C.,* 270 F. 2d 404. *Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy"* (29 FPC at 225) (emphasis added).

Significantly, the Commission, while describing its view of the temporary certificates before it on February 5, 1963, stated that "The initial price would, however, continue to be collected until a *prospective* price could be determined after hearing . . ." (29 FPC at 224) (emphasis added).

The *Skelly* case, handed down by the Court of Appeals for the District of Columbia Circuit on January 23, 1964 — less than one year after the Commission's Order of February 5, 1963 — furnished the first precedent for the ordering of refunds under unconditioned temporary certificates.[11] *Skelly* held that, while

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[11] The "Brief for Respondent Federal Power Commission," filed in the *Skelly* case in July, 1963, reflected the Commission's appraisal of the state of authority on this point:

> "The history of Commission producer regulation with respect to temporary authorizations clearly shows, however, that a producer in accepting unconditioned temporary authorizations such as those involved here would have had no reason to asume that they might later be required to make refunds for the period that the temporary authorizations were in effect." (Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission,* Case Nos. 17582, et al., CADC, page 29).

the Commission had the power to order refunds, the exercise of such power was not mandatory, but was bottomed in each individual case upon "equitable considerations." 329 F. 2d at 250.

Skelly did not, however, actually decide the major question of whether any later change in "declared law" as expressed in *Skelly* must be limited to prospective applicability only, *i.e.,* to temporary certificates issued after the date of the decision, January 23, 1964. *Skelly* itself only disposed of the temporary certificates there at issue.

In Movant's cases, the "declared law" doctrine is brought into focus as a legal issue because of the Commission Opinion of July 23, 1964, in *Union Texas Petroleum, et al.,* Docket No. G-13221, *et al.,* Opinion No. 436, 32 FPC 254 (1964). In Opinion No. 436, the Commission on the basis of *Skelly* found that it had the power to order refunds. 32 FPC at 265. While the Commission held that it would invoke this power only after an examination of the "equities," and reserved the actual ordering of refunds until a later date, the Commission nevertheless made it clear to the producers, by action taken in related cases, that the "excess" collections did not belong to them and that any "equities" would effect, at most, a partial and relatively modest reduction in refunds."

The Court of Appeals found that the *Skelly* decision did not govern collateral proceedings — the earlier Commission assurances and contrary judicial interpretation could not be ignored

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" See the discussion, *infra,* on this point.

of the last year of the extended term of such leases. The lessees relied upon a previous memorandum opinion of the Associate Solicitor of the Department of the Interior, which stated that such an assignment would effect a further two-year extension of the lease term under the Mineral Leasing Act. The appellants filed applications for leases which covered the same lands included in the assigned leases. Almost a year after the Associate Solicitor's ruling, the Secretary of the Interior held that, in order to effect a lease extension, an assignment had to be filed *before* the twelfth month of the last year of the extended term; an assignment filed *during* the twelfth month of the last year of such term was ineffective to extend the lease, and it terminated under the new construction of the governing statute, the Mineral Leasing Act, at the end of the twelfth month. While the Solicitor's opinion was thereby overruled, this overruling was expressly limited to prospective application, and the Court approved such treatment. The Court further observed that parties regulated by a Federal agency must rely upon administrative action taken by that agency in interpreting the governing statute:

> "Necessarily, persons who have acquired oil and gas leases of public lands from the United States, in making assignments or subleases to other persons, in obtaining extensions of such leases, in performing the terms of such leases, in entering into contracts with third persons with respect to the exploration and devolpment of such leases, in incurring liabilities and making expenditures in connection with the exploration, development and operation of such leases and in otherwise acting with respect to such leases, must in most cases act and rely upon interpretative regulations promulgated by, and decisions and opinions of the Depart-

ment of the Interior interpreting applicable statutes and regulations, . . . " (304 F. 2d at 949).

Finally, the Court in *Safarik* enunciated the view that:

" . . . courts ordinarily will give prospective effect only to a decision overruling prior decisions where persons have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retroactively would result in substantial harm to such persons." (304 F. 2d at 949-950) (Footnote omitted).

In *NLRB v. International Brotherhood of Teamsters,* 225 F. 2d 343 (CA 8, 1955), the union in its contract with the employer contractually reserved the right to settle all disputes relating to seniority. The NLRB declared such a reservation to be invalid and contrary to the terms of the National Labor Relations Act, notwithstanding a prior, outstanding case to the contrary decided by the NLRB, involving different parties; accordingly, the NLRB found the union to be guilty of an unfair labor practice. The Court indicated that the agency could, upon notice, make any prospective general pronouncement concerning the governing statute which it saw fit; however, it set out the caveat that the Board could not retroactively find a party's conduct to constitute an unfair labor practice, in contradiction to its own express, unrenounced holding (225 F. 2d at 348). Then, the Court expressed its view of the Agency's rulings from the standpoint of the purposes of the Federal Act involved, the position of the Agency, and the role of the regulated employer and union. In holding that the NLRB could not retroactively charge the Union with an unfair labor practice, the Court stated:

"When the practical purposes of the Act and the commanding control of the Board in their effectuation are considered, it does not seem to us to make either legal or common sense to say that the Board's rulings are wholly without any sanctity under the Act as a guide for employer or union conduct, but that the Act intends that anyone who relies upon and uses the Board's rulings as a basis for his actions shall be left subject to entrapment and branding as the perpetrator of an unfair labor practice in what he has thus done, if the Board thereafter chances, by reason of change in personnel or otherwise, to depart from one of its previous positions and rulings." *Ibid.*

Finally, similar reasoning applies without question to action taken by the Federal Power Commission under the Natural Gas Act.[23]

Thus, in *City of Chicago v. Federal Power Commission*, No. 19,604 (CADC, September 8, 1967), Natural Gas Pipeline Company of America put certain increased rates into effect on March 1, 1961, subject to refund under Section 4(e) of the Natural Gas Act. After a hearing on the lawfulness of these increased rates, a settlement was reached and approved by the Commission. The settlement, however, left open for future determination whether Natural would employ the liberalization or normalization method in calculating depreciation for the income tax component of its rate base. Natural agreed in the settle-

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[23] See *Alabama-Tennessee Natural Gas Co.*, 27 FPC 1180, 1182 (1962), 31 FPC 208, 209, 220 (1964); *Pure Oil Co.*, 25 FPC 383, 389 (1961), affirmed, *Pure Oil Co. v. FPC*, 299 F. 2d 370 (CA 7, 1962) (*prospective* regulation of escalation provisions); *Wisconsin v. FPC*, 373 U.S. 294, 304 (1963); see also *Rejection of Sales Contracts, etc.*, 27 FPC 339 (1962), which was issued on February 8, 1962, and provided for the rejection by the Commission of certain types of contracts executed after April 2, 1962.

ment to abide by any refund order with respect to this reserved issue, subject to its right to seek judicial review.

On February 3, 1964, the Commission issued its Opinion No. 417 in *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208, wherein the Commission decided that liberalized depreciation should be applied to Alabama-Tennessee, as well as to all other "typical pipelines." On March 18, 1965, in Opinion No. 456, *Natural Gas Pipeline Company of America*, 33 FPC 574, the Commission held that Natural was a "typical pipeline" and that the principles of *Alabama-Tennessee* were applicable to it. As to refunds, the Commission determined that Natural should calculate refunds from February 3, 1964, the date of the new construction revealed in the *Alabama-Tennessee* decision.

On Appeal, the City of Chicago contended that Section 4(e) of the Act required the Commission to make its refund order retroactive to March 1, 1961, the effective date of Natural's collection of the increased rates held invalid.

In affirming the Commission, the Court of Appeals held that Section 4(e)[26] of the Act permits the Commission to make its refund order retroactive, but does not require this result. The Court of Appeals described with approval the reasoning of the

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[26] It should be noted that the temporary certificates now before the Court are issued by the Commission under Section 7 of the Act, 15 USC 717(f). The initial rates specified in the temporary certificates thus are not subject to the refund procedures set out in Section 4(e) of the Act, which apply to increased rates only. In *City of Chicago*, the increased rates of Natural were *admittedly* subject to the refund procedures of Section 4(e) of the Act, from March 1, 1961, forward.

in the posture of the producers' cases. *Pan American Petroleum Corporation, et al. v. Federal Power Commission,* 376 F. 2d 161, 171-173 (CA 10, 1967). In answering the Commission's contention that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the *Skelly* decision, the Court of Appeals stated as follows:

> "Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certificates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that 'it is entirely possible * * * that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate.' It is difficult to imagine how a case in this posture could have dictated immediate preparation for a turning away from years of Commission assurances and from what was believed to be settled judicial interpretation." (376 F. 2d at 172) (footnotes omitted).

Finally, the Court pointed out that stability of prices is one of the great objectives of regulation under the Natural Gas Act, but that such objective was not achieved by the retroactive application of *Skelly* to the producers' temporary certificates. In fact, quite the contrary would be accomplished by applying the later "declared law" of *Skelly:*

"It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. *Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created.*" *Ibid.* (emphasis supplied).

B. Authorities

The effect of an overruling decision or a change in "declared law" has given courts difficulty since the early days of our jurisprudence.[20] In the early decisions it was conceived that tribunals did not have the *power* to deny retroactive effect to their decisions. But this limitation on power no longer exists — it is settled that the forum is not itself bound by legal doctrines of "power." *Linkletter v. Walker,* 381 U.S. 618, 629 (1965). There is thus no requirement that new "declared law" overruling a previous holding must be applied retroactively. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374 (1940); *Warring v. Colpoys,* 122 F. 2d 642 (CADC, 1941).

The reasoning underlying the application of changes in "declared law" to prospective transactions only is well expressed in an opinion of the Solicitor of the Department of Interior. In *Franco Western Oil Company, et al.,* 65 I.D. 427 (1958), the Secretary of the Interior declined to give retroactive application to certain provisions of the Mineral Leasing Act, and left undisturbed previous transactions concluded in reliance upon contrary administrative holdings. In quoting with approval an earlier opinion, the Solicitor stated (65 I.D. at 429-430) the following succinct summary of the reasoning on "declared law":

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[20] See, *e.g., United States v. MacDaniel,* 32 U.S. (7 Pet.) 1, 14-15 (1833). See also the discussion in *Warring v. Colpoys,* 122 F. 2d 642, 645-646 (1941), and the quotation from *Franco Western Oil Company* quoted *infra* in the text.

"The fiction that interpretation of laws reveals their eternal meaning has long stood in the way of any such distinction between the prospective and the retrospective application of decisions. But in recent years a more realistic view of the matter has achieved respectability. The Supreme Court has made it clear that nothing in the Federal Constitution or in the nature of the legal process prevents a tribunal from recognizing changing circumstances and laying down a rule for the future different from the rule which it has sustained for the past. Thus the Supreme Court has upheld the validity of a State court decision which lays down for the future a rule different from that applied in the past. The Supreme Court itself has, on occasion, laid down a new rule of law for the future while recognizing the propriety of a different rule in the past. The Supreme Court has likewise recognized the propriety of an administrative decision which lays down a new rule for the future without detracting from the validity of a different rule applied in the past." (Footnotes omitted)

This persuasive Opinion was sustained on appeal. See *Safarik v. Udall,* 304 F. 2d 944 (CADC, 1962), *cert. den. sub nom., Hansen v. Udall,* 371 U.S. 901 (1962), discussed *infra.*

To prevent injustice or a denial of due process of law in other proceedings, not only *may* the tribunal restrict the retroactive effect of the new "construction," but, indeed, in the proper case it is *obligated* to do so.[21] Thus, in *Chicot County Drainage District v. Baxter State Bank, supra, it* was stated that:

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[21] See, in addition to the other cases cited in the footnotes and text of this Section of this Brief, the following: *Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358 (1932); *State ex rel. Williams v. Whitman,* 116 Fla. 196, 156 So. 705 (1934); *Bassi v. Langloss,* 22 Ill. 2d 190, 174 N.E. 2d 682 (1961); *Gibbons v. Pan American Petroleum Corp.,* 262 F. 2d 852 (CA 10, 1958); *James v. United States,* 366 U.S. 213, 221-222 (1961); *Montana National Bank v. Yellowstone County,* 276 U.S. 499, 504 (1928); and *Nordstrom v. U.S.,* 360 F. 2d 734 (CA 8, 1966).

> "The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of the statute and of its previous application, demand examination." (308 U.S. at 374).

In *Linkletter v. Walker, supra,* this Court applied the rule stated in *Chicot County* to an express overruling situation, where *Wolf v. Colorado,* 338 U.S. 25 (1949), the "Wolf case," was overruled by *Mapp v. Ohio,* 367 U.S. 643 (1961), referred to as the "Mapp Case."[22] Linkletter, a state prisoner whose judgment of conviction had become final before the *Mapp* case, attacked the earlier judgment by way of *habeas corpus* proceedings. This Court expressed the considerations inhering in a change of "declared law" in terms of *Chicot County,* supra, and then summarized these considerations by stating that "we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retroactive application of Mapp." (381 U.S. at 636).

After finding that the purpose of the *Mapp* rule would not be advanced by making it retroactive, the Court noted that reliance was placed upon the earlier *Wolf* doctrine, both by the prosecution and the accused. Then, the Court, in concluding that retroactive application of the later case would not be made, stated that "there are interests in the administration of justice

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[22] *Mapp* held that the exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment to the Federal Constitution was required of the states by the due process clause of the Fourteenth Amendment. *Wolf* had earlier failed to apply this exclusionary rule to the states.

and the integrity of the judicial process to consider" (361 U.S. at 637), and, finally, "[t]o make the rule of Mapp retrospective would tax the administration of justice to the utmost." *Ibid.*

The *Chicot County* doctrine, well illustrated in *Linkletter, supra,* is by no means confined to cases involving criminal prosecution,[23] but applies as well to administrative actions taken under Federal Statutes. Where grave injustice or a denial of due process in other proceedings would result from retroactive application of the administrative action, the new "construction" must be confined to prospective effect. *Leedom v. International Brotherhood,* 278 F. 2d 237 (CADC, 1960); *Chapman v. El Paso Natural Gas Co.,* 204 F. 2d 46 (CADC, 1953);[24] *NLRB v. E & B Brewing Co.,* 276 F. 2d 594 (CA 6, 1960); *New Castle County Airport Comm. v. CAB,* 371 F. 2d 733 (CADC, 1966); *NLRB v. Majestic Weaving Co.,* 355 F. 2d 854 (CA 2, 1966); *Ringsby Truck Lines, Inc. v. U. S.,* 263 F. Supp. 552 (D. Colo., 1967); see also *Safarik v. Udall* and *NLRB v. International Brotherhood of Teamsters,* both discussed *infra.*

Thus, in *Safarik v. Udall,* cited *supra,* Federal oil and gas lessees under the Mineral Leasing Act filed assignments of their leases with the Secretary of the Interior *during* the twelfth month

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[23] In *Linkletter,* the court stated: "That no distinction was drawn between civil and criminal litigation is shown by the language used . . . in . . . *Chicot County, supra.*" (381 U.S. at 627).

[24] In decrying the attempted departmental repudiation of an earlier decision "for the sole purpose of applying some quirk or change in administrative policy," the Court in *Chapman* was constrained to point out that " . . . *even the power of executive or administrative agencies is not without limits.*" (204 F. 2d at 54) (emphasis supplied).

Commission in selecting the February 3, 1964, date from which refunds would be ordered:

> "Explaining why its ruling was not made retroactive to the effective date of Natural's rate increase, the Commission stated 'that in *Alabama-Tennessee* we were announcing a new policy and overruling previous decisions. It was therefore not equitable, contrary to the contentions of Chicago, to make our determination effective before February 3, 1964, but on that date the industry was informed of the new policy, and it was appropriate that refunds should be ordered from then.'" (Mimeo. ed., p. 21)

The Court held that "[t]he Commission acted sensibly and reasonably in making its new policy effective as of the date it was announced to the industry." *Ibid.*

To the argument of Chicago that the February 3, 1964, date would permit Natural to retain funds from rates which the Commission had found to be unjust, the Court replied that, prior to such date, Natural's rates were in effect determined to be just and reasonable.

C. What the Doctrine Means

The Commission has recognized in its refund orders relating to unconditioned temporary certificates the existence of the general problem presented by the change in "declared law" effected by *Skelly*.[27] However, the recognition by the Commission of this problem was limited — it extended only to "excess"[28] royalty sums and to "excess" state production taxes, and, in respect of these relatively small items, the Commission acted to excuse refunds prior to February 1, 1964,[29] only. In other words, except for token amounts — considering the total sums involved — complete refunds were ordered of all sums received by the producers above the "in-line" price during the entire period of temporary authority.

February 1, 1964, the date selected in *Hawkins and Hawkins*, Opinion No. 498, and repeated in the succeeding opinions ordering refunds, is admittedly a significant date — it follows the

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[27] See, *e.g.*, *Hawkins and Hawkins*, Opinion No. 498, 36 FPC 149, 151-152 (1966). This decision was followed by similar holdings in *Turnbull & Zoch Drilling Co.*, Opinion No. 499, 36 FPC 164 (1966), *Amerada Petroleum Corp.*, Opinion No. 501, 36 FPC 309 (1966), and *Sun Oil Co.*, Opinion No. 502, 36 FPC 317 (1966). Opinion No. 501 is presently before this Court for review in Nos. 80 and 97.

[28] The Commission uses the term "excess" to describe amounts paid or received during the continuance of temporary authority above the "in line" price ultimately determined at the time of permanent certification; in the case of state production taxes, the term "excess" means the incremental amount, if any, in taxes actually paid the state on revenue received during the period of temporary authority.

[29] The Commission in *Hawkins and Hawkins* arrived at this date by concluding that by February 1, 1964, "every producer can equitably be charged with knowledge that refunds might be ordered" pursuant to *Skelly*, which was handed down on January 23, 1964. (36 FPC at 152).

issuance of *Skelly* by about a week. However, this fact does not serve to confirm the validity of the Commission's opinions ordering refunds; it serves instead to point up the grievous error involved in the typical refund order described above.

The appearance of charity in excusing the refund of relatively minor or inconsequential amounts prior to February 1, 1964, should not obscure the real meaning and effect of the refund orders described above. Stripped of the pretense afforded by "sacrificing" small sums in obstensible deference to the *Chicot County* doctrine, it is plain that the Commission's refund orders really treat *Skelly* as having been in effect, continuously, from the date of issuance of the earliest of the unconditioned temporary certificates, forward. The refund orders in a real sense ignore all that happened before *Skelly;* they ignore the prior "declared law" revealed by administrative construction and by *Sunray Mid-Continent;* they ignore the reliance placed upon the unconditioned temporary certificates issued and accepted by the producers under the prior "declared law"; and they ignore the many reassurances provided the producing industry by the Commission concerning the meaning of unconditioned temporary certificates. Finally, the refund orders are blind to the unambiguous, contrary Commission decision issued on February 5, 1963, the decision in which the Commission forthrightly declined to engraft refund conditions on outstanding unconditioned temporary certificates; any such action, the Commission there stressed " . . . *would so denature the value of a Commission authorization as to place any*

reliance upon our actions in this area in serious jeopardy." 29 FPC 223, 225 (emphasis added).

The correct application of the authorities cited *supra* demands that *Skelly* be applied prospectively only, *i.e.*, to temporary certificates issued after January 23, 1964.[30] The date of issuance of the temporary certificate is the significant, operative fact. A temporary certificate issued prior to January 23, 1964, manifestly was issued under the "declared law" revealed by *Sunray Mid-Continent*, and, in view of this, all funds collected during the continuance of temporary authority (both before and after January 23, 1964) should be considered received under the aegis of that prior "declared law"[31] There can be no warrant for ordering any refunds whatever under temporary certificates issued prior to the date that the changed "declared law" of *Skelly* was spoken by the Court of Appeals for the District of Columbia.

The "interest of Justice,"[32] the inherent and also explicit considerations of equity in *this* case, compels and demands that the rule of *Skelly* be applied prospectively, only, to temporary authorizations issued *after* the date that *Skelly* became a part of our case law. Whatever may be said regarding "power," generally, the *Skelly* case cannot sanction retroactive refunds in Movant's docket, for injustice and a denial of due process of law would

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[30] Or, if preferred, after February 1, 1964, the date selected by the Commission for the limited purposes related *supra*.

[31] See Note 37, *infra*.

[32] 381 U.S. at 628. See *Linkletter v. Walker* cited *supra* in the text.

result thereby, as the court below so held. There is no directive in *Skelly* to apply the rationale of that case retroactively to transactions which were conceived by all concerned to have different legal consequences. There is no directive in *Skelly* to apply the doctrine of that case, robot-like and unthinking, to prior periods of time. Manifestly, there is no directive in *Skelly* to accomplish injustice, for, quite the contrary, *Skelly* called for the equities to be examined "pro and con a refund."

As stated *supra*, Skelly did not consider the controlling question of whether the change in "declared law" enunciated by it must be limited to prospective application only. That question is now ripe for decision in *this case, as to the facts here*, and it is submitted on authority that *Skelly* must be so limited and deemed to have no applicability to authorizations issued *prior* to the decision in that case. The circumstances present here do not permit the Commission to apply the new "construction" of *Skelly* to previous transactions, for, if that were done, due process would be transgressed, equity would be undermined, and the "interest of Justice" subverted.[33]

In considering the practical effect of Movants' argument,

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[33] The Commission's General Counsel did not hesitate to assert in *Skelly* that "[i]n these circumstances, the Commission's conclusion, that it would not be equitable to order refunds here since there had been no refund conditions imposed on the temporary authorizations, was eminently reasonable." (Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission*, Case Nos. 17582, *et al.*, CADC, p. 33). *How much less equitable, how much less reasonable, indeed, would it be to order refunds here, under Movant's temporaries in a wholly collateral case, in the wake of the many reassurances provided.*

it should be pointed out that there will not be wide application of the principles here contended for by Movant. The *Skelly* case, assuming *arguendo* its correctness, would apply to the temporary certificates involved in that particular case and to all unconditioned temporary certificates issued after January 23, 1964. Movant's "declared law" argument would apply only to unconditioned temporary certificates issued prior to *Skelly*.

In connection wtih the foregoing, it should be remembered that the issue now before the Court does not involve temporary certificates which are expressly conditioned to require refunds.[34] There are in any case a limited number of unconditioned temporary certificates issued prior to *Skelly* in which the issue here presented to the Court may arise. In all events, the question now before the Court has greatly declined in importance, for it is Movant's understanding that the majority of the pre-*Skelly* temporary certificates without express refund conditions prescribe prices at or below the current "in-line" price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed "in-line" prices.[35]

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[34] There is no question concerning the propriety of refunds ordered in accordance with a definite and certain *express* refund condition placed in a temporary certificate at the time of its issuance and acceptance.

[35] Additionally, Movant understands that, since the middle of 1964, the Commission has followed the policy of inserting *express* refund condi-

(Continued on Page 36)

Moreover, it should be borne in mind that the potential refund period under unconditioned temporary certificates[36] is a relatively brief period. In Movant's docket, the potential refund period runs from the date of initial deliveries (when Movant's choice became irrevocable by virtue of dedication to market) to July 23, 1964, when permanent certificates were issued in Opinion No. 436.[37] A non-recurring, "locked-in" period of potential refund liability is therefore involved, ending on the date of permanent certification.

Note 35 (Continued)

tions in temporary certificates authorizing sales at prices higher than those prescribed in previously determined "in-line" certificate proceedings. Moreover, it is clear that the Commission has unquestionably eliminated the ruling below with respect to all new temporary certificates, since it now requires the inclusion of *express* refund conditions pursuant to Commission general order (Order No. 336, Docket No. R-316, issued February 9, 1967). The issue before the Court, then, will not arise in temporary certificates hereafter issued.

[36] Although the Commission depicts the issue here involved as bearing upon its power to condition *permanent* certificates (FPC Petition in No. 60, pp. 10-11), the real meaning and effect of what the Commission proposes to do is to amend and condition final *temporary* certificates, retroactively. *Cf. FPC v. Hunt*, 376 U.S. 515, 523 (1964). The actual condition asserting the power to order refunds *does* appear in Movant's permanent certificate, but this condition plainly relates in practical effect to deliveries of gas under the precedent temporary certificate (32 FPC 254, 265, 273).

[37] After July 23, 1964, the date when permanent certificates were issued, the "in-line" price derived for Movant's docket will apply, prospectively, until the date that area rate levels are established for the Commission pricing area involved. (Under the principles and atuhorities here urged, refunds will not be ordered for deliveries of gas by Movant *prior* to July 23, 1964; after such date, Movant's price, as stated, will be determined by the final "in-line" price derived for Movant's docket).

D. Policy Supports the Doctrine

The "declared law" doctrine, as explained *supra,* must be applied here. The producers and pipelines acted upon the temporaries, as issued. They expended funds in justifiable reliance upon those unconditioned temporary certificates. The pipelines have become dependent, in part, upon the connected sources of supply to meet their market requirements.

The Commission previously determined, on February 5, 1963, that it would be proper to permit the producers to abandon service, if they chose, rather than submit to a new refund obligation imposed upon their unconditioned temporary certificates. However, the Commission at the same time held that this alternative would "clearly be contrary to the public interest" because:

> "... It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas." (29 FPC at 224).

The Commission, in declining to engraft refund conditions, forthrightly rejected the course of entrapment. It relied on the "certainty" rule of *Sunray Mid-Continent* and refused to place itself "in a position of having induced producers to dedicate their gas to the market on one set of conditions, and then imposing more

stringent conditions upon them"[38] 29 FPC at 225.

The reasoning in the Order of February 5, 1963, is no less pertinent today. Without more, it establishes that fundamental justice would be subverted by the belated imposition of a refund condition, here and now, in Movant's unconditioned temporary certificate.

The application of the "declared law" doctrine, as urged by Movant, will have no untoward effects for the future. As the prior "declared law" expressed in *Sunray Mid-Continent* was conceived to be very clear at the date of the Commission Order of February 5, 1963, so now will the change in "declared law" effected by *Skelly* guide interested parties *prospectively.*

Indeed, assuming the validity of *Skelly,* the industry is clear- "on notice" of *Skelly,* with regard to the meaning and effect of unconditioned temporary certificates issued after January 23, 1964. In all events, the Commission, itself, as indicated *supra* in Footnote 35, has acted to forclose any recurrence of the instant problem by requiring, pursuant to general order, the inclusion of *express* conditions in all new temporary certificates.

The *retroactive* application of *Skelly,* on the other hand,

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[38] The brief for the Commission in *Skelly* accurately assessed the nature of the attempts to impose after-the-fact-of-issuance refund conditions; it summarized the character of these attempts by succinctly stating that "[i]t is apparent therefore that the claim for refunds is an afterthought." (Brief for Respondent Federal Power Commission, *Public Service Commn. of the State of New York v. FPC,* Case Nos. 17582, *et al.,* CADC, p. 31).

would destroy any semblance of administrative integrity and regularity in the case of unconditioned authorizations issued under the ascendency of contrary Commission authority, when *Sunray Mid-Continent* provided all concerned with judicial guidance.

Certainly, changes in interpretation and "policy" are inevitable concomitants of the administrative process. Indeed, flexibility in decision-making is a distinct advantage enjoyed by the administrative agency, and may even be one of the principal reasons for agency existence. However, an absence of restraint in the retroactive application of decision-making may well, over the long term, impair and defeat the very flexibility which the administrative body requires for the fruition of its function. Finally, the yielding to retroactive decision-making may possibly secure short-term advantages, but such are obtained at large cost — in destroying the finality of definitive orders, price stability is eliminated and any reliance for business planning purposes is undercut.

The considerations advanced with regard to price stability and reliance for business planning purposes are very important in the gas industry. The producer in almost all instances commits its gas to the pipeline purchaser under a long-term sales contract, typically for a 20-year term or the life of the producing leases involved. The producer recognizes the pricing risks that are inherent in his regulated activity; the Commission may condition his temporary certificate at the time of issuance, to govern sales under temporary authority, and, later, may condition his permanent certificate to govern sales thereafter. But these "built-in" risks which are inherent in Commission regulation of the natural gas industry

should not be compounded by retroactive price-conditioning. The producer, in making a decision respecting the commitment of his gas to the regulated market, must be able to assess his risk for the purposes of business planning by examining the plain language of written Commission orders in the context of governing "declared law." The alternative is chaos and confusion in the agency and industry alike.

VII. CONCLUSION

The Court of Appeals held that the Commission lacks statutory power to order refunds under the unconditioned temporary certificates in Nos. 60-62, 80, and 97, this Term; the Court below found *Skelly* to be an erroneous expression of the Commission's power under the Natural Gas Act, relying instead upon the principles of *Sunray Mid-Continent*. These separate Court of Appeals decisions should be affirmed on the ground of want of power in the Commission. So also should the decision below in Nos. 227 and 415 be affirmed.

However, even if the Court of Appeals erred on the question of power, the results there reached on the issue of refunds were correct and should be affirmed on the basis of the "declared law" doctrine. *Skelly*, in all events, should not be applied retroactively to unsettle previous transactions concluded under the earlier prevailing construction of the Natural Gas Act revealed by *Sunray Mid-Continent*.

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December 11, 1967

SUPREME COURT

JAN 29 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 60, *et al.*

FEDERAL POWER COMMISSION, ET AL., *Petitioner,*

v.

SUNRAY DX OIL COMPANY, *Respondent.*

No. 111

SHELL OIL COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent.*

No. 143

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY, *Petitioners,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents.*

SUPPLEMENTAL MEMORANDUM ON TAKE-OR-PAY BALANCES

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SUPPLEMENTAL MEMORANDUM ON TAKE-OR-PAY BALANCES

At the request of Mr. Justice Harlan, made during oral argument on January 23, 1968, I am supplying the following information. The take-or-pay balances for the

five pipelines purchasing gas from the dockets in the *Hawkins* and *Sinclair* cases were as follows:

	As of December 31, 1963	As of December 31, 1966
Tennessee Gas Transmission Company	$ 1,322,000	$ 2,127,742
Natural Gas Pipeline Company of America	none	none
Trunkline Gas Company	none	none
Florida Gas Transmission Company	$ 384,000	none
United Gas Pipe Line Company	$19,829,638	$15,305,465

The source of the figures in column two, except for those for United Gas Pipe Line Company, is the testimony of witness Gody, at III R. 1338, 9 (p. 91 and 92 of Volume 3 of the Joint Appendix), which were in turn taken from the Form 2 Reports filed by these pipeline companies with the Federal Power Commission. The figure for United Gas Pipe Line Company for December 31, 1963 was obtained from Form 2 Report filed by United Gas Pipe Line Company with the Commission for the year 1963, page 210.

The source of the figures in column three are the same Form 2 Reports filed with the Commission in 1967, for the year 1966, and are the latest figures available. They were compiled by the Commission in a publication entitled "Statistics for Interstate Natural Gas Pipeline Companies, 1966," and appear at page XXIV, Table 18 of that publication.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 61.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, et al.,
Respondents.

No. 97.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
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BRIEF FOR PETITIONER, THE UNITED GAS IMPROVEMENT COMPANY.

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BRIEF OF PETITIONER THE UNITED GAS IMPROVEMENT COMPANY.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit (I R. 6696-57) to which the writ in No. 61 is di-

rected is reported at 370 F. 2d 181 (1966). The order of the Court of Appeals for the Tenth Circuit to which the writ in No. 97 is directed (II R. 6885-91) is reported at 376 F. 2d 578 (1967). The opinions and orders of the Federal Power Commission (herein called "Commission") reviewed by the Court of Appeals and involved in No. 61 (I R. 5768-804, 6030-38) are reported at 31 F. P. C. 623 and 1315 (1964). The opinions and orders of the Commission reviewed by the Court of Appeals and involved in No. 97 (II R. 6222-30, 6426-31) are reported at 36 F. P. C. 309 and 962 (1966).

JURISDICTION.

The judgment of the Court of Appeals involved in No. 61 was entered on December 9, 1966. The Petition for a Writ of Certiorari in No. 61 was filed on March 8, 1967 and was granted on October 9, 1967 (I R. 6927), — U. S. —. The judgment of the Court of Appeals involved in No. 97 was entered on March 27, 1967, rehearing denied May 18, 1967 (II R. 6921-25). The Petition for a Writ of Certiorari in No. 97 was filed on April 18, 1967 and was granted on October 9, 1967 (II R. 6930), — U. S. —. At the same time petitions for writs of certiorari filed by the Commission, the Public Service Commission of New York and other distribution companies, attacking the same judgment on similar grounds, were granted and the cases consolidated for argument (I R. 6926-28, II R. 6929-30), — U. S. —. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) & (e) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended*, 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

> **Extension of Facilities: Abandonment of Service.**
>
> Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:
>
> * * *
>
> In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pend-

ing the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTIONS PRESENTED.

These cases involve certificate applications by independent producers under § 7(c) of the Natural Gas Act. The issues now before this Court arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers in Texas Railroad District No. 4, the area involved in these cases, at the very high unregulated prices contained in the producer-pipeline contracts. After the statutory hearing the Commission erroneously relied on these unregulated price levels in *ex parte* temporary certificates and other *ex parte* action to escalate the price level for the area required by the public convenience and necessity under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*Catco*), from the 15¢ per Mcf the Commission had established in an earlier proceeding to 16¢ per Mcf. However, it did undertake pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court to determine whether refund of excesses above the new lawful price, collected under *ex parte* temporary certificates, was required in order to afford the consumer a complete bond of protection. On appeal by consumer representatives the Court of Appeals below affirmed the escalation of the "in-line" level. On cross appeal by producers the court held that the Commission lacked all power to order refund of unlawful excesses. In the meantime the Commission had held that partial refund of excesses had to be made. On a second appeal by producers, the court below vacated this refund order, relying on its prior decision. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund

amounts collected under *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Assuming § 7 permits the Commission to so condition permanent certificates, were the conditions reasonable in this case?

3. Did the Commission err in relying on temporarily certificated prices and other *ex parte* action to permit an escalation in the price level for District 4 above the level earlier found to be in line with other properly certificated sales in the area?

STATEMENT OF THE CASE.

These cases present important questions of the proper exercise of the Commission's authority to protect the consumer in the issuance of certificates of public convenience and necessity to independent producers under § 7 of the Natural Gas Act. The narrow issue raised by the present appeals is the Commission's power to condition such permanent certificates upon the refund by producers of unlawful excess money collected under *ex parte* temporary certificates during the protracted period when producer and consumer interests were litigating the question of the appropriate initial price level before the Commission. Two courts of appeals, those for the District of Columbia Circuit and the Tenth Circuit, have considered this issue and have reached directly opposite conclusions as to the Commission's power under § 7. However, as will be shown below, the Court of Appeals for the District of Columbia Circuit had opportunity to explore all sides of the important regulatory problems presented by the issuance of *ex parte* temporary certificates, and that court concluded that the Commission had full power to order refunds.

Sunray DX Oil Company and the ten other producer-respondents involved in Nos. 61 and 97 entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was to be (and eventually was) resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producer-respondents applied for temporary certificates. These applications were made pursuant to that part of

§ 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate. . . ." Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers or threatening loss of gas to the interstate market. Rather, such applications allege only the possibility of economic problems for the individual producer itself.

All of the producer respondents here, relying on § 157.28 of the Commission's regulations, alleged one or more of the following emergency conditions calling for prompt Commission action:

> ". . . drainage, threatened loss of lease, flaring, [or] economic hardship resulting from payment of shut in royalties. . . ." (FPC Regs. § 157.28(c), 18 C. F. R. § 157.28(c)).[1]

In invoking § 157.28 of the Commission's regulations these producers necessarily acquiesced in the condition set forth

1. The implication of all such allegations is that if the producer does not receive the privilege of *ex parte* temporary certification it will suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege, and any benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy. The allegations of threatened loss by the eleven producers involved in these refund cases can be found at: I R. 4115 (Sohio: "economic hardship"), 4126 (Sun: flaring, loss of lease), 4141 (Hunt: drainage), 4184 (Sun: drainage), 4193 (Texaco: "ill will" of lessor), 4206 (Sun: loss of lease), 4222 (Sunray: drainage), 2232 (Clark: drainage, shut-in royalties), 4249 (Sotex: drainage), 4332 (Sun: drainage), 4367 (Texaco: "ill will" of lessor), 4381 (Sun: drainage), 4398 (Coates: drainage, shut-in royalties, economic hardship), 4434 (Cox: drainage), 4479 (Humble: loss of lease), 4588 (Patchin: loss of contract, drainage).

in that section, which expressly states that any temporary certificate issues only:

> "pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or *other condition as may be attached to the issuance of the certificate. . . .*" (Emphasis added).

While the temporary certificates issued to the producers here involved did not contain the word "refund," they each contained the following (or a substantially similar) provision:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (*E.g.*, I R. 4147, 4148, 4225, 4240-42, 4330)

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant (*E.g.*, I R. 4147). No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including the United Gas Improve-

ment Company [2] and the Public Service Commission of the State of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon refund of amounts already collected in excess of the legal conditioned rate level.

The crucial Commission decision passing upon this issue was one involving new sales in Texas Railroad District No. 4.[3] *Skelly Oil Company*, 28 FPC 401, 1065 (1962). In *Skelly* the Commission held that although it might have power to order refunds in some cases, it was inequitable to do so in the case before it because the temporary certificates issued to the producers there involved did not contain the express word "refund" and therefore gave the producer no warning of potential liability.[3]

This aspect of the decision was appealed to the Court of Appeals for the District of Columbia Circuit by the New York Public Service Commission, The United Gas Improvement Company and Long Island Lighting Company.[4] The

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

3. In the case of certificates which do contain the word "refund," the Commission orders refunds without further consideration of equities (II R. 6223, 36 F. P. C. at 309).

4. Several producers also appealed the aspect of the Commission order which reduced the rates they were collecting under tempo-

Court of Appeals reversed as to this aspect, holding that the mere absence of an express refund condition in a temporary certificate was not a sufficient equitable consideration to justify the denial of consumer protective refunds. *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963. It remanded for further proceedings, as the result of which the Commission ultimately ordered substantial refunds. *Skelly Oil Co.*, 35 F. P. C. 849 (1966)[5].

In the meantime there was a significant related development. As a result of the pressures generated by the above litigation, the Commission took the step of making a file of *ex parte* letter certificate orders available in its public reference room (however, it still published no notice of these). By special daily investigation the New York Public Service Commission discovered certain out-of-line certificates (involving South Louisiana sales) in this file within the statutory thirty-day appeal period after their issuance and appealed these *ex parte* orders also to the Court of Appeals for the District of Columbia Circuit. These letter orders were issued under the lead docket *J. Ray McDermott et al.*, 28 F. P. C. 563, 814, 1300 (1962). The *Skelly* appeal was pending at the same time and thus the District of Columbia Circuit was presented with all aspects of the regulatory problem of *ex parte* temporary certificates. *McDermott* and *Skelly* were heard by the same panel of judges within a month of each other and the decisions in the two were handed down within the same month. Each must necessarily be read in the light of

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rary certificates from 16¢ per Mcf to 15¢ per Mcf to be thereafter collected under permanent certification. This aspect of the Commission's decision was affirmed on appeal. *Public Service Comm'n v. FPC*, 329 F. 2d 242, 345-348 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil and Gas Co. v. F. P. C.*, 377 U. S. 963.

5. Producers have appealed this decision to the Tenth Circuit, further complicating the legal picture. *Skelly Oil Co. v. FPC*, CA 10 No. 9000 *et al.*, in abeyance pending the present appeal.

the other. The court held in *McDermott* that the Commission had power to issue temporary certificates by letter to producers, even at "out-of-line" prices, but only if such *ex parte* action was subject to complete review and adjustment at the time of permanent certification after hearing. *Public Service Comm'n v. FPC*, 327 F. 2d 893 (D. C. Cir. 1964). Then, in *Skelly*, the Court held that out-of-line temporary certificates were subject to adjustment by the ordering of refunds. *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963.

From the preceding history it can be seen that *McDermott* and *Skelly* graphically presented to the Court of Appeals for the District of Columbia Circuit the regulatory problem created by the use of emergency temporary certificates. First, if temporary certficates were to have any efficacy as emergency measures, the Commission had to be permitted discretion to issue them at once without a hearing. Compare 28 F. P. C. at 1305. However, so long as no hearing was permitted, the possibility could always exist (and in many cases did exist) that the price temporarily certificated would be one which would be unlawful and injurious to the consumer under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378. This conflict of policies led inevitably to the sound practical resolution made by the Court of Appeals for the District of Columbia Circuit in these two cases. Implicit in the *McDermott* and *Skelly* decisions is recognition of the fact that if refund protection for the consumer is not available in the temporary certificate situation, there could easily be a return to the pre-*Catco* error of permitting unregulated entry of gas into the interstate market, subject only to later prospective adjustment. Without such refunds, *Catco* could be nullified by a shift

of the crucial Commission approval from the permanent to the temporary certification procedure, to the detriment of the consumer.

A final element completes the legal background of the present case. When the Commission in 1960 abandoned individual producer rate regulation and adopted an area approach, see *Wisconsin v. FPC*, 373 U. S. 294, it issued a Statement of General Policy setting forth, *inter alia*, certain so-called "guide-line" price levels for initial prices in various areas. Statement of General Policy, No. 61-1, 24 F. P. C. 818, issued September 28, 1960. This Statement was issued without notice or hearing and was not subject to court review. *Wisconsin v. FPC*, 292 F. 2d 753 (D. C. Cir. 1961).

Nonetheless it had a direct impact on the present proceeding. In the *Skelly* decision discussed above the Commission confined its 15¢ per Mcf price finding to a period prior to September 28, 1960. It severed out from *Skelly* four dockets involving contracts dated after the Statement and consolidated them with other certificate applications involving contracts also dated after that time (I R. 4636-40) to create the proceeding here under review. Petitioner and other consumer representatives intervened and the case was heard on the merits.

The Presiding Examiner's decision was issued on July 23, 1963 (I R. 5315-61). The Examiner, on the basis of the Commission's *Skelly* precedent (then not yet reversed by the Court of Appeals), refused to impose refunds of excesses collected under temporary certificates even though he found that temporary rates above 15¢ per Mcf were unlawful. Petitioner and other intervenors excepted to this decision. On January 24, 1964, the Court of Appeals for the District of Columbia handed down the *Skelly* decision and on March 23, 1964, the Commission issued its Opinion 422 in the present proceeding (I R. 5768-5804).

The Commission reversed the Examiner's refusal to order refunds and, relying on the Court of Appeals' *Skelly* decision, severed out and deferred decision on this refund issue pending the filing of briefs and possible evidence.[6]

Various producers appealed this refund ruling to the Court of Appeals for the Tenth Circuit which on December 8, 1966, reversed and held that:

> "[R]efunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition." (I R. 6743-44).

In issuing Opinion No. 422 the Commission noted that the *Skelly* decision called for a consideration of the question of whether refunds of amounts collected under temporaries could be ordered. However, it deferred decision on the issue and called upon the parties to submit briefs as to whether refund of unlawful excess money should be ordered or not (I R. 5798). The various parties responded and the Commission, accepting at their face value the allegations of facts made by the producers in these briefs, found that the public interest required the refund of all amounts collected in excess of the legal in-line level. However, the Commission excused repayment of unrecoupable sums paid for state taxes and for royalties prior to the date when the Court of

6. In this opinion the Commission also found, contrary to the contention of Petitioner and other intervenors, that the "line" for initial prices had risen from the 15¢ per Mcf found in the *Skelly* proceeding for the period before 1960 to 16¢ per Mcf for the period after. The Court of Appeals below affirmed this finding of a change in the line. Petitioner believes the decision of the Commission and the court to be erroneous as a matter of law. *Public Service Comm'n v. FPC*, 373 F. 2d 816 (D. C. Cir. 1967) *cert. granted*, Nos. 111 *et al.*, O. T. 1967 (reversing an identical escalation in the in-line level in Districts 2 and 3). As to this point Petitioner feels there is no reason to burden this Court by restating the Argument in the Brief of the New York Public Service Commission *et al.* which challenges the court below on this point.

Appeals' decision in the *Skelly* case put producers on notice that refunds might legally be ordered. Sunray DX Oil Company and the other producer respondents also appealed these orders to the Court of Appeals for the Tenth Circuit, which on March 27, 1967, set aside the orders summarily "on the authority of" its decision in the appeal from Opinion 422 quoted above (II R. 6885-91). The Court summarized its holding as follows:

> "We are committed to the principle that the Commission has no power to order refunds when the temporary certificate contains no express refund provisions."

Petitioners sought review of both the above decisions in this Court and certiorari was granted.

ARGUMENT.

I.

The Commission Has Full Power to Order Refund of Unlawful Amounts Collected Under Temporary Certificates.

The Court of Appeals for the District of Columbia Circuit properly construed § 7 of the Natural Gas Act in *Public Service Comm'n. v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963 ("Skelly"), in holding that the ordering of refunds of unlawful amounts collected under temporary certificates was a proper remedy available under § 7 of the Natural Gas Act. Its decision is fully consistent with the opinions of this Court requiring full protection for the consumer and the ordering of refunds to accomplish this end. *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223, 229; *Atlantic Ref. Co. v. PSC*, 360 U. S. 378. See also *Continental Oil Co. v. FPC*, 378 F. 2d 510, 529-32 (5th Cir. 1967), *cert. pending* Nos. 526 *et al.*, O. T. 1967.

The different conclusion reached by the Court of Appeals for the Tenth Circuit below was based on erroneous reasoning apparently derived from a failure to recognize the function of temporary certificates. For example that court states:

> "We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed *so that it may make an intelligent decision whether to accept or reject the certificate.*" II R. 6743 (Emphasis added).

The emphasized rationale overlooks the crucial fact that each of the producers here, in their sworn certificate appli-

cations to the Commission, alleged an emergency condition of drainage, loss of lease or payment of shut-in royalties (see footnote 1, p. 8 *supra*). Therefore, by their own representations, the producers were not in the situation contemplated by the court below, that of making a business choice between two price levels, say 15¢ and 18¢ per Mcf. Rather, they were, as the result of chance or previous business decisions, in an emergency situation in which the only alternatives were receiving *something* for the gas by an interstate sale (whatever the price) or *receiving nothing* and instead losing some or all of the gas through drainage, flaring, or loss of lease, or having to pay royalties in the absence of any income. It is solely because of these emergency circumstances that the Commission is permitted by law to grant the producer a temporary certificate at all.

The above consideration shows why the court's discussion of public interest questions such as adequacy of supply (II R. 6736) and price stability (II R. 6742) are misplaced and beside the point. Hearings under Sections 4, 5 and 7 of the Natural Gas Act are the forum in which the Commission weighs these public interest questions and decides whether, in a given case, consumer protection may best be preserved by affording a higher or lower price to a producer. Thus the "public convenience and necessity" and "just and reasonable" standards of these sections have given recognition to the fact that the legitimate interest of the producer and pipeline, that price stability and adequacy of supply, as well as the interest of the consumer, are to be considered in determining how best to accomplish the Act's primary purpose of consumer protection. The simple issuing of a temporary certificate for the *sole function* of "bailing out" an individual producer from a business emergency, without consideration of broader public interest questions, creates entirely different legal relationships. Refunds provide the

only mechanism for protecting the consumer under such circumstances.

Again the court erroneously notes:

> "For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate." II R. 6743.

However, as early as January of 1962, the Commission announced in its landmark decisions in *Catco*-on-remand, *Continental Oil Company*, 27 FPC 96 (1962), that refunds could be ordered under unconditioned temporary certificates. In that decision the Commission stated at 110:

> "With respect to the unconditioned temporary certificate issued to Atlantic in Docket No. G-15374, the refund provision is likewise applicable. The temporary certificate gave no unalterable right to the proposed price. Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for a certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

Moreover, long before the contracts here at issue were entered into and the temporary certificates for them issued by the Commission the position of petitioner and other distribution companies as to the proper "in-line" initial price for Railroad District No. 4 and the fact that refunds would be sought were fully spread upon the record in the *Skelly* proceeding, *Skelly Oil Co., et al.*, Docket No. G-18638, *et al.* Ample notice existed and afforded producers full opportunity to protect their interests.

Finally, the court below errs in construing the language set forth at p. 9 above and contained in each certificate issued to these producers as limited solely to prospective adjustments by the Commission (II R. 6740). Nothing in the language suggests such an interpretation. Rather, the language specifically disavows any "approval of any rate [or] charge . . . . ." It likewise disavows "recognition of any claimed contractual right or obligation . . ." associated with the proposed sale, and, as noted above, Section 157.28 of the Commission's Regulations, under which these temporaries were sought and issued, indicates that they must be issued "without prejudice to such . . . condition as may be attached to the issuance of the certificate. . . ." Given the basic duty of the Commission to protect the consumer interest, especially in an *ex parte* situation, it was clearly error for the court to read a restriction into the language of these letter orders which does not appear from their plain meaning and which could serve only to permit producers to retain unlawful excess rates at the expense of the consumer whom the Act was designed to protect. Both the District of Columbia Circuit in its *Skelly* decision, *supra,* and the Fifth Circuit in its recent decision in *Continental Oil Co. v. FPC,* 378 F. 2d 510, 532 (5th Cir. 1967), *cert. pending* Nos. 526 *et al.,* O. T. 1967, concluded, in the words of the Fifth Circuit:

> "Whether or not this is characterized as 'boiler plate' language it was sufficient in our opinion to put the Producers on notice of the possibility that refunds of excessive amounts might ultimately be required. . . ."

This Court in *United Gas Improvement Co. v. Callery Properties,* 382 U. S. 223, recently ruled on the power of the Commission to order refunds and that ruling is con-

sonant only with the decision of the District of Columbia Circuit in *Skelly*. Implicitly it rejected the reasoning of the court below. In *Callery* this Court was unanimous in holding that:

> "The Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U. S. at 229.

The general legal proposition underlying this conclusion was the Court's holding that:

> "an agency, like a court, can undo what is wrongfully done by virtue of its order." *Ibid.*

This principle applies squarely to the present case. Here the "wrong" done by virtue of the Commission "order" was its permitting of sales of gas in interstate commerce at illegally high rates which would be passed along to the consumer pending a hearing on whether the public interest in fact required such sales or such high rates.

Callery can hardly be distinguished from the present case on the ground that *Callery* involved permanent certificates issued after hearing, from which a timely appeal was taken with an ultimate reversal, whereas the case at bar involves temporary certificates not reviewed by a court. Rather, *Callery* presented a more difficult case since there the Commission had held a full hearing before issuing *permanent* certificates, and the court did not stay those certificates. In the present case, however, neither the Commission nor a court had ever had an opportunity to scrutinize the price levels and determine whether they were legal prior to the time the consumer was obliged to begin

paying them. And, moreover, the Commission regulations make clear that a temporary certificate, because of the emergency circumstances of its issuance, is entirely tentative. Thus it is as subject to revision as were the permanent certificates in *Callery* which were appealed to the courts. In the present case the appeal was originally not to the courts but to the Commission at the time of hearing on the permanent certificates and this was the first time that consumer representatives had an opportunity to intervene and contest the temporary certificates, until ultimately the Commission reversed its earlier *ex parte* orders and issued permanent certificates at lower rates. In both cases the governing legal principles are the same—the rectifying of certificates issued to producers by the Commission under erroneous principles of law which never became final but were ultimately corrected by the Commission.

II.

The Decision of the Commission Herein to Order Partial Refunds Was a Proper Exercise of Its Discretion and Should be Affirmed.

Because the Court of Appeals for the Tenth Circuit ruled that the Commission lacked all power to order refunds of unlawful amounts collected pursuant to temporary certificates in its decision under review in No. 97, it did not reach the issue, presented by the appeals of the producers, of whether (assuming refund power) the Commission abused its discretion in ordering partial refunds from the present respondents. However, this Court clearly has authority to review this issue, as it has done in a number of previous FPC cases, without remand to the court below for initial consideration. See *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223, 229, 231; *United Gas Improvement Co. v. Continental Oil Co.*, 381 U. S. 392, 404-05;

FPC v. Southern California Edison Co., 376 U. S. 205; *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U. S. 103, 114. The exercise of this power by this Court has been peculiarly appropriate in cases involving Federal Power Commission regulation because of the great delay frequently encountered in such proceedings, delay which inevitably works to the detriment of the consumer. This element of delay is particularly acute in the present case which was originally instituted in September of 1962 and which, after a number of delays, unsuccessfully resisted by consumer representatives (see, *e.g.*, Order Denying Motion to Expedite Proceedings, 30 FPC 681 (1963)), was not ultimately resolved on the refund question until December of 1966. Moreover, this case became probably the most litigated gas case in the courts of appeals. See *Amerada Petroleum Corp. v. FPC*, 338 F. 2d 808 (10th Cir. 1964); *Sunray DX Oil Co. v. FPC*, 351 F. 2d 395 (10th Cir. 1965); *Long Island Lighting Co. v. FPC*, CADC No. 18622, appeal dismissed July 14, 1964 (unreported). While the present case deals with refunds, rather than prospective rates, this Court has noted the serious injury to the consumer which can flow from delay in ordering refunds. *FPC v. Tennessee Gas Transmission Co.*, 376 U. S. 145. The Commission's decision under review in No. 97 was based on the factual allegations of producers accepted at their face value and rejected or accepted as a matter of law. Therefore there is no factual dispute and the issue is peculiarly appropriate for review at the present time.

The Commission was bound to make its decision on the basis of the "equities." *Public Service Comm'n. v. FPC* 329 F. 2d 242 (D. C. Cir. 1964). In that case the court held that the mere fact that a producer might, as a practical matter, have failed to anticipate the possibility that unlawful amounts collected under temporary certificates might be

ordered refunded was insufficient as a matter of law to excuse the producers from paying such refunds. The basic issue before the Commission, therefore was a balance between the often declared purpose of the Act to offer the consumer a complete, permanent and effective bond of protection—a purpose which would require the ordering of full refunds—and the particular circumstances of a given producer which might create a hardship outweighing this statutory purpose. Compare, *Skelly Oil Co.*, 35 F. P. C. 849 (1966). This *Skelly* opinion was the first Commission opinion to order refunds under temporaries and it posed the issue as follows:

> "In reaching this result [the ordering of refunds], we begin with the proposition that the overriding purpose of the Natural Gas Act is the protection of the gas consuming public, as the courts have emphasized time and time again. With this in mind, it is helpful to know just how the sums subject to refund came into existence. The producers here were initially granted temporary authorization to make sales in interstate commerce at the rates they requested. This was done on an ex parte basis, and no interested party was given notice or an opportunity to present its views to the Commission. Nevertheless, the temporary authorization granted in each case specifically indicated that it could not be construed as approval of any rate and is granted without prejudice to such final disposition of the certificate application as the record may require. In most of the cases, this expedited treatment was justified on the basis that the producer would otherwise experience an economic hardship of one sort or another. Only two cases posed a threat of loss of gas to the interstate market, in contrast to the interest of a private party. This procedure continued long after it was

widely known that certain interested parties, notably the New York Public Service Commission, protested the initiation of any sales from this area at an initial rate of more than 14.6 cents per Mcf." 35 F. P. C. at 8.

The same basic issues are posed by the present case. Only one of the producers here alleged a possible loss of gas through flaring in its request for *ex parte* emergency relief. All the others alleged circumstances which would have led only to a total loss for the producer, without necessarily a concomitant loss to the interstate consumer.[7]

Most of the reasons advanced by producers for retaining these excess sums (the reasons are summarized in the Commission's Opinion at II R. 6225-26) are of a general policy nature and deal broadly with the impact of ordering refunds upon the producing industry as a whole (see, *e.g.*, II R. 6464-80). It was clearly correct for the Commission to conclude that producers who had invoked emergency provisions to save themselves from complete financial loss could not equitably be excused from individual refunds on the basis of policy considerations which must be industry-wide in their scope and impact in order to have significance. This *ad hoc* regulatory conflict, arising essentially from the Commission's failure, between 1959 and 1964, to protect the consumer adequately with conditions in temporary certificates, had to be resolved on the basis of considering individual cases. In the absence of allegations by the producers of individual hardship, the Commission was justified in rectifying its earlier errors by ordering refunds. The Commission did find that the payment of unrecoupable state taxes and of royalties based on the illegally high sales price for given gas constituted an excusable outlay by the producers who may have relied

7. See footnote 1, p. 8 *supra*.

on the price level permitted in the temporary certificate. Therefore, to the extent that these payments were in fact unrecoverable, the producer was not required to make a refund thereof.[8]

The Commission's resolution of this matter constitutes a proper exercise of its duty under the Natural Gas Act to afford a complete bond of protection to the consumer. And it correctly ordered the immediate payment of refunds, for as this Court said in the *Callery* decision:

> "We think that the Commission could properly measure the refund by the difference between the rates charged and the 'in-line' rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the 'just and reasonable' rate could be determined. We have said elsewhere that it is the duty of the Commission, 'where refunds are found due, to direct their payment at the earliest possible moment consistent with due process.' FPC v. Tennessee Gas Transmission Co., 371 U. S. 145." 382 U. S. at 230.

While it could well be argued that refunds herein should have been ordered much earlier, it cannot be maintained that there is now any reason or excuse for further delay.

8. Since the excusing of these refund and royalty amounts was based on a theory of reliance, the Commission properly concluded that they could not be excused subsequent to the date of the decision in the Court of Appeals in the *Skelly* case, 329 F. 2d 242, which was issued in January of 1964.

CONCLUSION.

For the foregoing reasons it is urged that the opinion of the court below to which the writ in No. 61 is directed be reversed insofar as it affirmed an escalation of the in-line price and held that the Commission lacked power to order refunds of excess amounts collected under temporary certificates. Likewise, the opinion of the court below to which the writ is directed in No. 97 should be reversed for applying the court's earlier holding that the Commission lacked power to order such refunds, and Opinion 501 of the Commission ordering partial refunds of unlawful amounts collected above the in-line level should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 61.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, et al.,
Respondents.

No. 97.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER, THE UNITED GAS IMPROVEMENT COMPANY.

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OCTOBER TERM, 1967.

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No. 97.

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

REPLY BRIEF OF THE UNITED GAS IMPROVEMENT COMPANY.

ARGUMENT.

When the joint brief filed herein by producer-respondents and the brief of the *amicus curiae* are read in the light of this Court's decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U. S. 223, the self-refuting nature of their arguments against the power and duty of the Commission to order refunds becomes apparent. Both briefs claim for the *temporary* certificates at issue, which were issued *ex parte* to meet conditions claimed by the producers to constitute emergencies for them, a permanency and immutability which *permanent* certificates issued after full hearing but corrected under Section 19 of the Act do not have. Any such conclusion would create a "locked-in" period of interstate gas sales wholly free from effective Commission regulation as to price. Such an exemption from regulation would be directly contrary to the intent of Congress in passing the Natural Gas Act to provide the consumer with complete regulatory protection from the moment gas first enters the interstate stream. *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378, 389; *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677, 679 (D. C. Cir. 1963) ("But the public must be protected from the time the gas first enters interstate commerce").

When the Commission permits gas to enter interstate commerce on an unregulated basis, any price not consistent with the public convenience and necessity must be subject to full correction at the time effective regulatory action first takes place. *United Gas Improvement Co. v. Callery Properties, Inc., supra.* Both producer briefs attack this proposition as "retroactive rate making" and a violation of so-called "filed rate" or "declared law" doctrines. However, the crucial substantive distinction between cases like

Callery and the present one and cases like *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246,* is that there is no rate which has assumed finality in the first line of cases, a fact ignored here by the producers. By the terms of Section 7 of the Act, the temporary certificates received by producer-respondents were issued "pending the determination of an application for a certificate" and obviously were never granted the exemption authorized by the section in some cases. Since these temporary rates were permitted on an *ex parte* basis and had no finality, the filed-rate doctrine has no applicability. See *Continental Oil Co. v. FPC*, 378 F. 2d 510, 529-32 (5th Cir. 1967), *cert. pending* Nos. 526 *et al.*, O. T. 1967; *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963; *Pan American Petroleum Corp. v. Kansas—Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962), *cert. denied*, 370 U. S. 937.

Despite this vital fact, all the producer arguments are directed to convincing this Court that rates collected under *ex parte* emergency temporary certificates should be accorded a finality equal to that of rates set after full public hearings under Sections 7, 4 or 5 of the Act and no longer subject to correction under Section 19 of the Act. Such an argument is self-refuting.

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* See also *T.I.M.E., Inc. v. United States*, 359 U. S. 464, and *FPC v. Hope Natural Gas Co.*, 320 U. S. 591.

CONCLUSION.

For the foregoing reasons, Petitioner requests the Court to grant the relief described in detail in the Conclusion of its initial brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner*,

v.

SUNRAY DX OIL COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND TENTH CIRCUITS

BRIEF FOR CONSUMER-DISTRIBUTOR GROUP

The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York, Petitioners in No. 62, Respondents in Nos. 111, 143, 144, and 231

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 60, 61, 62, 80, 97, 111, 143, 144, and 231

FEDERAL POWER COMMISSION, *Petitioner,*

v.

SUNRAY DX OIL COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND TENTH CIRCUITS

BRIEF FOR CONSUMER-DISTRIBUTOR GROUP
The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York, Petitioners in No. 62, Respondents in Nos. 111, 143, 144, and 231

OPINIONS BELOW

In these consolidated proceedings, the several petitioners request this Court to review two opinions of the Court of Appeals for the Tenth Circuit and one opinion of the Court of Appeals for the District of Columbia Circuit.

1. In Nos. 60, 61, and 62, petitioners (Federal Power Commission, United Gas Improvement Company, and the Consumer-Distributor Group) seek review of the Tenth Circuit's opinion in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181 (I R. 6696), which affirmed in part and reversed in part the Commission's opinion and order in *Amerada Petroleum Corp.*, Opinion No. 422, 31 FPC 623 (I R. 5769).

2. In Nos. 80 and 97, petitioners (FPC and United Gas Improvement)[1] seek review of the Tenth Circuit's opinion in *Standard Oil Co. of Texas* v. *F.P.C.*, 376 F.2d 578 (II R. 6885), which reversed the Commission's opinion and order in *Amerada Petroleum Corp.*, Opinion No. 501, 36 FPC 309 (II R. 6223).

3. In Nos. 111, 143, 144, and 231, petitioners (producers and FPC) seek review of the District of Columbia Circuit's opinion in *Public Service Commission of New York* v. *F.P.C.*, 373 F.2d 816 (IV R. 4290), which reversed in major part two separate Commission opinions and orders—*Hawkins & Hawkins*, Opinion No. 475, 34 FPC 897 (III R. 7288), and *Sinclair Oil & Gas Co.*, Opinion No. 476, 34 FPC 930 (IV R. 4171).

JURISDICTION

The judgment of the court of appeals in *Sunray DX Oil Co.* v. *F.P.C.* was entered on December 9, 1966, and the petitions for a writ of certiorari (Nos. 60, 61, and 62) were filed on March 9, 1967.

The judgments of the court of appeals in *Standard Oil Co. of Texas* v. *F.P.C.* were entered on March 27,

[1] The Consumer-Distributor Group petition for certiorari is pending in No. 503, this Term.

1967, and the petitions for a writ of certiorari (Nos. 80 and 97) were filed, respectively, on April 5 and April 18, 1967.

The judgment of the court of appeals in *Public Service Commission of New York* v. *F.P.C.* was entered on February 7, 1967, and the petitions for a writ of certiorari were filed, respectively, on April 26 (No. 111), on May 8 (Nos. 143 and 144), and, pursuant to an order entered May 8, 1967 extending the time to file, on June 8, 1967 (No. 231).

On October 9, 1967, this Court granted the nine petitions for writs of certiorari and consolidated the cases. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. § 717r (b).

STATUTES INVOLVED

Section 7 of the Natural Gas Act provides in pertinent part as follows:

> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for

which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c).]

* * * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act

and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e).]

QUESTIONS PRESENTED

1. May the Federal Power Commission issue a certificate of public convenience and necessity authorizing a producer to sell natural gas to an interstate pipeline in the absence of any evidence that there is a public need for the proposed sale, and in the face of its own findings in contemporaneous cases that the purchasing pipeline is already contractually obligated to purchase more gas than it can physically take into its system?

2. May the Federal Power Commission, consistent with this Court's *Catco*[2] admonition to hold the price line in certificating new sales, elevate its previously determined in-line certificating level by reference to (a) the prices contained in the contracts for which certificate authority is being sought, (b) the prices contained in temporary certificates issued on an *ex parte* basis pending the outcome of hearings on the underlying applications for permanent certificates, and (c) the guideline prices contained in a Commission policy

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[2] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

statement that had been issued without notice, hearing, or record?

3. Where the Federal Power Commission, having issued *ex parte* temporary certificates to producers pending hearing and disposition of their certificate applications, determines after full hearing on those applications that the prices collected pursuant to the temporary certificates were out of line and not consistent with the public convenience and necessity, does the Commission have the power and the duty to require the producer applicants to refund the excess amounts collected under the temporary certificates?

STATEMENT OF THE CASE

Background—The Gulf Coast area of Texas, which in recent years has accounted for 17-20% of all gas sold for resale in interstate commerce, has been divided into three districts by the Texas Railroad Commission, and the state commission's classification has been followed by both the producing industry and the Federal Power Commission. The most southerly of the Gulf Coast districts is Texas Railroad Commission District No. 4, a fifteen-county area bounded on the south and west by Mexico and on the east by the Gulf of Mexico; immediately to the north along the Gulf is District 2, a ten-county area; and to the north of District 2 and stretching to the Louisiana border are the twenty-nine counties comprising District No. 3. Most of the major pipelines serving the Northeast begin in the Texas Gulf Coast and traverse these three Districts before heading into Louisiana and on north.

Although at the advent of producer regulation, in 1954, gas in the Texas Gulf Coast sold at an average price of less than 10¢ per Mcf, during the late "50's

the Commission authorized a number of new sales at higher prices, culminating in a series of orders in 1959-60 certificating new sales at prices as high as 18¢ per Mcf. These levels were arrived at, however, in Commission proceedings from which interested consumer intervenors had been excluded, and on appeal the courts held that such exclusion was improper and that the orders granting certification must be vacated, *Public Service Commission of New York* v. *F.P.C.*, 295 F. 2d 140 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 948; *Hunt Oil Co.* v. *F.P.C.*, 334 F.2d 474 (5th Cir. 1964). Then, in September 1960—after its issuance of the 18¢ certificates and while the ultimately successful appeals from those certificates were pending—the Commission, acting *in camera*, issued a Statement of General Policy, 24 FPC 818, in which it announced for each producing area the "guideline" initial-price levels at which, in the absence of objection, it intended to certificate new sales. As Mr. Justice Clark was subsequently to observe, these guideline levels were based on "the *highest* permanently certificated rate in the respective areas as of September 1960," *Wisconsin* v. *F.P.C.*, 373 U.S. 294 at 316 (dissenting opinion; emphasis in original). Thus, the initial-price guidelines for Districts 2, 3, and 4 were fixed at 18¢ per Mcf, but, as the Commission itself later conceded, the sales on which the Gulf Coast guideline levels were based were those which had been erroneously certificated after exclusion of the consumer intervenors, and accordingly could not be used for in-line purposes.

The Prior Gulf Coast Proceedings—The first contested Commission proceeding involving the Gulf Coast to be decided following issuance of the policy statement—and the first to be decided in accordance with this Court's *Catco* standards—was the *Skelly* case, *Skelly*

Oil Co., Op. 362, 28 FPC 401 (1962). There, the Commission held that the proper certificating (or "in-line") level in District 4, at least for contracts entered into prior to the September 1960 policy statement, was 15¢ per Mcf. Having made that determination, however, the Commission limited its scope in three important respects: First, it declined to order the producers to refund amounts which had been collected in excess of 15¢ per Mcf under temporary certificates pending the outcome of the hearings; second, it concluded, over the dissent of two Commissioners, that it should not decide on the basis of the *Skelly* record that the in-line level had continued at 15¢ *after* issuance of the policy statement, and accordingly it severed from *Skelly* and set for separate hearing four dockets based on contracts entered into after September 1960; and third, by separate order (and again with two Commissioners dissenting), it revised its policy statement guideline for District 4 from the 18¢ established in September 1960 to 16¢, or 1¢ more than the in-line level it had just found in *Skelly*, 28 FPC 441. The dissenting Commissioners, unable to perceive how issuance of the *in camera* 18¢ guideline (now demonstrated by the record in *Skelly* to be excessive by 3¢) could have any effect on the in-line level, would have issued certificates conditioned at the 15¢ level to the four *Skelly* applicants having post-September 1960 contracts, and would have reduced the guideline level for the future to the 15¢ in-line price.[3]

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[3] On appeal, the District of Columbia Circuit (1) sustained the 15¢ in-line finding against producer claims that a higher price was required, and (2) reversed, at the instance of consumer petitioners, the Commission's refusal to order refunds of excess amounts collected under temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963.

The next contested Gulf Coast proceeding involved sales from District 3 and District 4 pursuant to contracts entered into in July of 1960. The presiding examiner found that the in-line price for both districts was 15¢ per Mcf, *Texaco Seaboard Inc.*, 29 FPC 603, but on appeal to the Commission, a majority of the Commission concluded that the in-line price for District 3 was 16¢ per Mcf, *Texaco Seaboard Inc.*, Op. 383, 29 FPC 593 (1963). Contemporaneously with that opinion, the Commission revised its District 3 guideline to 17¢, or 1¢ more than the in-line price it had just found, 29 FPC 590. Again, two Commissioners dissented, stressing, first, that the evidence demonstrated an in-line level for District 3 of 15¢, and, second, that the guideline level should properly be set at the in-line level rather than 1¢ or 2¢ in excess of that level.

The final in-line case in this series came before the Commission in December 1963, *Hassie Hunt Trust,* Op. 412, 30 FPC 1438, and involved proposed sales from all three Gulf Coast Districts under contracts dated both before and after the September 1960 policy statement. After reaffirming for the Districts 3 and 4 sales the in-line findings made in *Skelly* and *Texaco Seaboard,* the Commission found that the District 2 in-line price was 15¢ prior to the issuance of the policy statement, but, consistent with its action in *Skelly,* it severed the post-policy statement contracts for further hearing, and, consistent with the actions taken for District 4 at the time *Skelly* was adopted and for District 3 at the time *Texaco Seaboard* was adopted, it amended the policy statement to provide for a new District 2 guideline 1¢ in excess of the in-line level it had just determined, 30 FPC 1435. Once again, both actions were taken by a split Commission.

The Present Proceedings

Amerada—The four dockets severed from the *Skelly* case were consolidated with 34 other producer applications to sell gas from District 4 fields under the lead docket, *Amerada Petroleum Corporation,* CI62-1544, (28 FPC 397; I R. 4636). The *Amerada* producer contracts, which called for initial prices ranging from 15.9¢ to 19.8¢ per Mcf, had been entered into between October 1960 and August 1962, and the purpose of the *Amerada* proceeding presumably was to determine the effect, if any, that the policy statement had upon the 15¢ in-line level which had obtained in District 4 up to issuance of the statement.

The most significant evidence presented at the hearing, held in the latter part of 1962, was an exhibit sponsored by an FPC staff economist (Exh. 16; I R. 1600-25) showing price and other information for all post-1954 District 4 contracts with a price of 14¢ or more filed with the FPC.[4] The contracts were classified into three groups: Schedule 1 showed the proposed sales for which certificate authority was being sought in the *Amerada* proceeding itself; Schedule 2 showed all sales that had been permanently certificated; and Schedule 3 showed sales being made under temporary certificates pending Commission action on final certification.

By decision issued July 23, 1963 (31 FPC 647; I R. 5315-61), the examiner held that both as a matter of

[4] The decision to omit evidence on contracts having an initial price of less than 14¢—an omission that could only lead to a higher in-line price than otherwise—was rationalized on the ground that no party was contending for an in-line level of less than 14¢, and the omission reduced the magnitude of the witness' task in preparing his exhibit.

fact and as a matter of law the promulgation of the policy statement guidelines had no effect on the appropriate in-line level for contracts negotiated after the guidelines, and that the determination of the in-line price for such contracts should be based on the same standards—an analysis of permanently certificated contracts dated during the time period in question—that were applied by the Commission in *Skelly* and subsequent cases. Such an analysis produced an in-line level of 15¢ per Mcf, the price at which the examiner recommended that certificates be issued to the *Amerada* producers. On the question of refunds of amounts in excess of 15¢ collected under the temporary certificates, the examiner ruled that he was bound by the Commission's *Skelly* precedent (subsequently reversed on the refund point by the D.C. Circuit[5]) and he therefore declined to order refunds.

On March 23, 1964, the Commission issued its order in the case (Opinion No. 422, 31 FPC 623; I R. 5769-5804), reversing the examiner on the key finding that the in-line price for post-policy statement contracts was 15¢ per Mcf. While apparently conceding that the in-line procedure followed by the examiner and theretofore consistently followed by the Commission—an analysis of permanently certificated contracts that were not suspect—would lead to an in-line finding of 15¢ per Mcf, the Commission held that the prior permanent certifications provided an inadequate sample, and that, in consequence, weight should be given to the contract prices negotiated during the period in question (whether or not certificated by the Commission), to the prices contained in temporary certificates, to the

[5] See note 3, *supra*.

prices being requested by the *Amerada* applicants, to the 18¢ policy statement guideline, and to Commission "expertise"; consideration of these factors led the Commission to find an in-line price of 16¢ per Mcf. Commissioner Ross, dissenting, pointed out that none of the bases used by the majority to arrive at the 16¢ figure was legally permissible, and that "the rule [adopted by the majority] in this case is that when the normal evidentiary basis for establishing an in-line price is absent, then anything else will do" (31 FPC at 643; I R. 5798). On the refund question, the Commission, while noting that two months earlier the D.C. Circuit had in the *Skelly* appeal reversed the Commission's refusal to order refunds of excess amounts collected pursuant to temporary certificates, nonetheless deferred to an indefinite future date resolution of the refund matter.

Hawkins—Immediately following issuance of its *Amerada* opinion, the Commission set for hearing all pending Texas Gulf Coast certificate applications in which initial price might be an issue. Thus, by order issued March 25, 1964 (IV R. 3573), the Commission consolidated 42 pending District 2 applications, *Sinclair Oil & Gas Co. et al.,* G-16760 *et al.;* by order issued March 30, 1964 (III R. 6227), it consolidated 40 District 3 applications, *Hawkins & Hawkins et al.,* G-18077 *et al.;* and by order issued May 28, 1964, it consolidated 67 District 4 applications, *Turnbull & Zoch Drilling Co. et al.,* G-17960 *et al.* The contracts on which these 149 applications were based had, with few exceptions, been entered into between mid-1958 and December 1963 and called for prices ranging from 14.5¢ to 20¢ per Mcf.

A prehearing conference in the District 3 proceedings, *Hawkins & Hawkins,* was held on April 23, 1964, at which time the following issues were specifically noted: (1) the need of the purchasing pipelines for the gas proposed to be sold, especially in light of the take-or-pay problems which the pipelines were then experiencing; (2) the propriety of the initial prices proposed by the producers; and (3) the obligation of the producers to refund amounts collected in excess of the in-line price pursuant to their temporary certificates. Hearings were held from July 8 to July 17, 1964. On the question of need for the gas, the applicants presented no evidence to demonstrate that the pipelines were in need of the gas or, indeed, that the pipelines could take the proposed gas into their respective systems without cutting back on other gas supplies which they were contractually obligated to pay for whether taken or not. The bulk of the evidence presented at the hearings related to showing the in-line price for District 3, with testimony on this issue sponsored by both the applicants and the Staff of the Federal Power Commission. The Staff exhibit (Exh. 1; III R. 1412-48) was a comprehensive listing showing the initial prices of all producer sales contracts entered into between June 7, 1964 and December 31, 1963, and the data contained in the exhibit formed the basis for the in-line findings subsequently made by the examiner, by the Commission majority, and by the dissenting Commissioners. In addition, a number of the producer applicants presented evidence to support their position that, upon issuance of permanent certificates at the conclusion of the proceedings, they should be relieved of the obligation to make refunds of the amounts in excess of the in-line level collected under their temporary certificates.

On October 13, 1964, while the case was awaiting decision by the examiner, the Commission granted an appeal taken by the producers and ordered the examiner to take no action on the refund issue, holding that this issue should be deferred until some later date following a separate hearing on the subject (32 FPC 991, rehearing denied 32 FPC 1387; III R. 6731, 6769). On December 2, 1964, the examiner entered his decision (III R. 6775-6805), holding (1) that need had been adequately demonstrated by the fact that contracts had been entered into and deliveries had commenced under temporary certificates, and (2) that the in-line price for District 3 for the entire period under consideration (1957-63) was 16¢ per Mcf.

Nine and a half months later, on September 22, 1965, the Commission issued its order here under review. The majority decision (III R. 7291), written by Commissioner O'Connor for himself and Chairman Swidler, held (1) that the issue of public need could not be raised in a producer certificate proceeding, (2) that the in-line price for the period prior to September 28, 1960—the date of the Commission's policy statement—was 16¢ per Mcf, and (3) that the in-line price for the period following September 28, 1960 escalated to 17¢. The Commission stated that it had arrived at the 17¢ price by giving weight, *inter alia,* to temporarily certificated prices of up to 18¢, to contract prices of up to 20¢, and to three 18¢ prices that had been permanently certificated at an abridged (uncontested) hearing.[6] Commissioner Bagge concurred separately (III R. 7306), stating that his con-

[6] These three sales were the only sales during the entire period that had been permanently certificated at a price in excess of 16.5¢.

currence in the 17¢ in-line price "takes into account the existing guideline price" of 17¢ fixed by the Commission in September 1962.

Commissioners Black and Ross dissented (III R. 7308), pointing out that both as a matter of law and as a matter of sound policy the majority erred

> "in relying on temporaries to support its findings, in affording weight to the sales certificated under Commission policies which since have been repudiated by the Courts and the Commission, and in affording weight to our guideline policy statement."

Sinclair—Developments in the District 2 proceedings, *Sinclair Oil & Gas Co.*, paralleled those in *Hawkins & Hawkins*. The statistical exhibits presented by the Commission Staff (Exhs. 4, 5; IV R. 703-56, 757-64) indicated that both before and after issuance of the policy statement some 80% of total contract volumes had been permanently certificated at a price of 14.2¢ per Mcf or less, and over 90% had been certificated at a price of 15¢ per Mcf or less; on the basis of these data, the Staff witness concluded that "there are no major changes concerning contracts dedicating natural gas for use in interstate commerce for the period after the Policy Statement as compared to the period prior thereto," and recommended a 15¢ in-line level for the entire 1957-64 period (IV R. 324). Following an adverse examiner's decision (IV R. 3906), exceptions were filed by the consumer intervenors (IV R. 4068, 3989) and by the Staff of the Federal Power Commission (IV R. 4076). On September 22, 1965—the same day that it issued its opinion for District 3 in *Hawkins & Hawkins*—the Commission issued its District 2 order here under

review. The majority decision (IV R. 4172), written by Chairman Swidler for himself and Commissioner O'Connor, held (1) that the consumer interests had not properly raised the issue of public need, and (2) that although the in-line price for the period immediately preceding the policy statement was 15¢ per Mcf, it had, upon issuance of the policy statement, escalated to 16¢. As in *Hawkins & Hawkins,* and for the reasons set forth in their respective opinions in that case, Commissioner Bagge concurred in the majority's result, and Commissioners Ross and Black dissented (IV R. 4193).

The Refund Orders—Although the D.C. Circuit had ruled in January 1964 that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts collected, *Public Service Commission of New York* v. *F.P.C.* (*Skelly*), 329 F.2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.,* 377 U.S. 963, the Commission took no further action, either in the remanded *Skelly* case itself or in other cases where the refund issue was presented, until June 1, 1966, when the Commission directed the *Skelly* producers to refund, with appropriate interest, the amounts that had been collected in excess of 15¢ per Mcf under their temporary certificates, with the exception of amounts paid out as royalties or in state production taxes where not recoupable, *Skelly Oil Co.,* Op. 492, 35 FPC 849, appeals pending, No. 9000 et al., 10th Cir., *Skelly Oil Co.* v. *F.P.C.* Subsequently, in July 1966, the Commission entered similar orders in the *Amerada, Hawkins, and Turnbull & Zoch*[7] proceedings

[7] In September 1965 the Commission had, contemporaneously with issuance of its in-line decisions in *Hawkins* and *Sinclair,* entered an in-line opinion in *Turnbull & Zoch*—Opinion No. 478, 34 FPC 1001.

—*Amerada Petroleum Corp.*, Op. 501, 36 FPC 309; *Hawkins & Hawkins*, Op. 498, 36 FPC 149; *Turnbull & Zoch*, Op. 499, 36 FPC 164—though, strangely, no such order has ever been entered in the *Sinclair* proceeding. The July opinions added one essential clarification—since the producers could "equitably be charged with knowledge that refunds might be required" once the D.C. Circuit's January 1964 *Skelly* decision was announced, the offset to refunds for royalties and unrecoupable taxes based on the excess collections would not be allowed after February 1, 1964, see, *e.g.*, *Hawkins & Hawkins*, Op. 498, 36 FPC 149 at 151-152. In most instances, the state taxes (7% of sales price) are recoupable, and the normal royalty is 12.5%, so that the effect of the Commission's refund orders was to require the refund, with interest, of approximately 87% of the excess collected prior to February 1, 1964 and 100% of the excess thereafter.

The Decisions of the Courts of Appeals

Amerada Appeal—Appeals from the Commission's 1964 *Amerada* opinion were taken by both the consumer and producer interests, with all petitions ultimately being transferred to the Tenth Circuit.[8] On December 9, 1966, that court issued a decision substantially adopting the producer arguments, *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181. On the in-line issue,

[8] Sunray DX Oil Company, the only party to the consolidated proceedings located in the Tenth Circuit, filed its petition for review in the Tenth Circuit within minutes after the Commission's denial of rehearing. Although Sunray's well had run dry even prior to the commencement of the hearings, the Tenth Circuit held that it had proper venue, and accordingly the petitions for review filed by the consumer petitioners in the D. C. Circuit and by the other producers in the Third, Fifth, and Sixth Circuits were transferred to the Tenth Circuit.

the court sustained the Commission's elevation of the District 4 line to 16¢. Though apparently conceding that the factors relied on by the Commission to arrive at the 16¢ price were, in fact, "suspect" under the prior court and Commission decisions, the court held that, in the circumstances of the case, reference to "suspect" prices was necessary in order to reflect properly "the price at which substantial volumes of gas are currently contracted for sale in interstate commerce" (370 F.2d at 189; I R. 6722). Judge Seth, dissenting in part, would have gone even further than the majority; in his view, reference to current market conditions would yield a figure substantially higher than 16¢. On the refund question, the court, noting its disagreement with the holding of the D.C. Circuit in the *Skelly* appeal, ruled that the Commission was without power to require refunds of excess amounts collected under temporary certificates, and accordingly ruled that the Commission erred in severing the refund question, since the only course open to the Commission was to discharge the producers from any refund liability whatsoever.

Hawkins-Sinclair Appeal —Appeals from the Commission's September 1965 opinions in *Hawkins* and *Sinclair*, taken by the producer and consumer interests, were consolidated for argument in the District of Columbia Circuit, and on February 7, 1967, the court entered its decision, *Public Service Commission of New York* v. *F.P.C.*, 373 F.2d 816. In an opinion written by Chief Judge Bazelon (Judge Wilbur K. Miller dissenting without opinion), the court of appeals reversed the Commission's certification of the *Hawkins* and *Sinclair* sales on the grounds that the Commission had failed to find that there was a public need for the gas proposed to be sold and that the Commission had, with-

out legal warrant, elevated the in-line level for sales to be made under post-1960 contracts. Although accepting the premise urged by the producers and the Commission that contract prices and prices in temporary certificates "reflect current conditions in the industry," the court held that the whole purpose of in-line pricing was to protect the consumer from prices arrived at in the unregulated market, not to reflect that market. Turning to the refund question, the court noted that while these appeals were pending, the Commission had entered an order directing the *Hawkins* producers to make refunds, and it assumed a *Sinclair* order would follow.

Amerada Refund Appeal—Producer appeals from the Commission's July 1966 order requiring refunds in *Amerada* were taken to the Tenth Circuit, and in March 1967 the court, on motion of one of the producer petitioners, summarily reversed the refund order, citing its December 1966 *Sunray DX* decision for the proposition that the Commission lacked power to order refunds, *Standard Oil Co. of Texas* v. *F.P.C.* 376 F.2d 578.

Related Cases—Petitions for certiorari presently pending before this Court in two other proceedings raise similar issues:

1. *Turnbull & Zoch.* As noted above (p. 12, *supra*), at the time the Commission instituted the *Hawkins* proceeding for District 3 and the *Sinclair* proceeding for District 2, it instituted a new District 4 proceeding, *Turnbull & Zoch,* Docket No. G-17960, which was decided by the Commission in September 1965, at the same time as *Hawkins* and *Sinclair.* The *Turnbull & Zoch* opinion—Opinion No. 478, 34 FPC 1001—was virtually identical to the *Hawkins* and *Sinclair* opin-

ions: (1) the producers were not required to demonstrate a public need for their gas as a prerequisite to certification; (2) the in-line price for District 4 was elevated 1¢ per Mcf as of September 28, 1960; and (3) action on refunds was deferred. Again, appeals were taken by both the consumer and the producer interests; this time, the first petition was that filed with the Fifth Circuit. On May 24, 1967, the court of appeals entered its decision, sustaining the producer and Commission position on need and in-line price, and sustaining the consumer and Commission position on refunds, *Continental Oil Co.* v. *F.P.C.*, 378 F.2d 510. The consumer petitioners have filed petitions for certiorari on the need and in-line issues (No. 520, this Term), and certain of the producers have filed petitions for certiorari on the refund question (Nos. 504, 526, and 628, this Term).

2. *Union Texas.* As part of a July 1964 determination involving Southern Louisiana sales, the Commission, consistent with its then-current practice, deferred the question of refunds of past collections of out-of-line prices under temporary certificates, *Union Texas Petroleum,* Opinion No. 436, 32 FPC 254. Although generally sustaining the Commission's opinion against various producer atacks, the Tenth Circuit, consistent with its December 1966 *Sunray DX* decision,[9] set aside the Commission's opinion insofar as it dealt with refunds, *Pan American Petroleum Corp.* v. *F.P.C.*, 376 F.2d 161, March 9, 1967. Petitions for certiorari have been filed by the FPC and by the consumer interests on the refund question (Nos. 227 and 415, this Term), and by one producer on the in-line question (No. 516, this Term).

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[9] *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181, now before this Court on writs of certiorari in the instant consolidated appeals.

SUMMARY OF ARGUMENT

I.

The Commission's unprecedented holding that an applicant for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act may be granted a certificate in the absence of any evidence that there is, in fact, a public need for the gas proposed to be sold is contrary to the statute and to the entire concept of public convenience and necessity. The Commission's dereliction in this regard precluded any consideration of such vital elements of public convenience and necessity as market demand and conservation; further, in view of the serious oversupply situation of the pipeline purchasers, the Commission's certification of these additional sales will serve to increase the costs—without any corresponding benefit—to the pipelines and their customers. The court of appeals was clearly correct in holding

> "[W]hen a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. Its decision must be made *before* it grants a permanent certificate to a producer."

II.

In *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), this Court admonished the Commission to protect the consumer against potentially excessive prices for new sales of gas by exercising its certificate-conditioning power to hold the price line pending the determination of just and reasonable producer rates. Immediately following *Catco,* the courts of appeals made it clear

that in determining the line to be held the Commission was required to look to prices which had been subjected to meaningful regulatory control, since untested prices were "suspect" and would form an unreliable standard.

In the cases here under review, the Commission, departing from precedent, elevated its previously determined in-line levels by according controlling weight to the prices proposed by the certificate applicants, the prices contained in *ex parte* temporary certificates, and the prices contained in the Commission's policy statement; each of these untested prices was held to reflect current market conditions. It was, however, precisely because reliance on current market conditions was inadequate to protect the consumer from excessive prices that in-line price-conditioning became necessary, and as Judge Bazelon noted in one of the decisions below (IV R. 4306):

> "The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control."

III.

In order to assure protection of the consumer from the time the gas first enters the interstate market, the producers must be required to refund the excess amounts collected under their temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964). The fact that the temporary certificates did not contain an "express" refund condition is irrelevant: by their very nature, temporary certificates are not, and cannot be, final, and there is

no basis for holding that the producers acquired, by their *ex parte* temporary certificates, a vested right to charge excessive rates—with no consumer right to redress—during the long pendency of the temporary certificates.

ARGUMENT

I. THE COMMISSION MAY NOT AUTHORIZE NEW SALES OF NATURAL GAS IN INTERSTATE COMMERCE IN THE ABSENCE OF A SHOWING OF PUBLIC NEED FOR SUCH SALES.

Concurring in the position urged by the consumer petitioners below, the Court of Appeals for the District of Columbia Circuit held that the Commission erred in issuing certificates authorizing the *Hawkins* and *Sinclair* producers to sell their gas in interstate commerce in the absence of any finding that the proposed sales were needed by the public; the court deemed unpersuasive the Commission's contention that the question of need could be deferred to a subsequent hearing on the purchasing pipeline's certificate application. Although the court of appeals' reversal on the need issue has not been challenged in this Court by the Commission, it has been attacked by certain of the producers. Notwithstanding our conviction that the decision of the court below was eminently correct, we acquiesced in the grant of certiorari on this issue in order to clarify the conflict between the decision below and the subsequent contrary decision of the Fifth Circuit in *Continental Oil Co.* v. *F.P.C.* (*Turnbull & Zoch* appeal), 378 F.2d 510 at 526, petitions for certiorari pending, Nos. 504, 520, and 526, this Term.

The relatively recent emphasis on the need issue may be explained briefly. In the earlier producer certificate

cases, the consumer interests were willing to stipulate that there was a need for the gas in order to focus the contest on the heavily litigated issue of price. And, indeed, in the mid and late '50's, there was little evidence to suggest that there was not in fact a public need for the sales that were being proposed.[10] By the early 1960's, however, it was becoming increasingly clear that most, if not all, of the pipelines purchasing in the Texas Gulf Coast and Southern Louisiana had worked themselves into a serious oversupply situation, whereby they had contractually obligated themselves to take, or at least to pay for, larger volumes of gas than they were physically capable of putting through their systems. This obviously resulted in considerable added cost to the pipelines, and, beginning with two 1964 opinions, the Commission has indicated a willingness to permit the pipelines to pass these increased costs along to the consumer in the form of higher rates. *United Gas Pipe Line Co.*, Op. 428, 31 FPC 1180 at 1186-87, 1191-92; *United Gas Pipe Line Co.*, 32 FPC 1515 at 1519. Accordingly, when the *Hawkins* and *Sinclair* (and the related *Turnbull & Zoch*) proceedings came on for hearing in mid-1964, the consumer intervenors declined to stipulate that there was a public need for the proposed sales. Despite the absence of any stipulation, the producers presented no evidence on the question of need, preferring to rely on their legal position—ultimately rejected by the court below—that a

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[10] But see *Atlantic Refining Co.* v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 at 393 (1959):

> "Nor do we find any support in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.'"

producer applicant is entitled to a certificate without a showing of need.

The court below, relying on the decisions of this Court, had little difficulty in finding that both market demand and conservation were elements of public convenience and necessity. It noted that in *Atlantic Refining Co.* v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 (1959), this Court "seems to have imposed on the producer the burden of proving public need before certification" (373 F.2d at 821; IV R. 4295), and that in *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961), this Court "decided that conservation was relevant to public convenience and necessity" (373 F.2d at 821; IV R. 4296). In concluding on the need issue, the court below summarized its holding as follows (373 F.2d at 823; IV R. 4299; emphasis in original):

> [W]hen a party makes a non-frivolous claim that there is no public need for the gas the FPC must give considered reasons if it decides otherwise. its decision must be made *before* it grants a permanent certificate to a producer."

And indeed, as this Court has repeatedly held, see, *e.g.*, *F.P.C.* v. *Texaco Inc.*, 377 U.S. 33 at 42-44 (1964); *F.P.C.* v. *Hunt*, 376 U.S. 515 at 525-26 (1964), the Congressional purpose, in adding Sections 7(c) and 7(e) to the Natural Gas Act in 1942, was to give the Commission an opportunity to scrutinize all aspects of a proposed sale *prior* to its commencement, H.R. Rep. 1290, 77th Cong., 1st Sess., pp. 2-3.

Four months after the D.C. Circuit's decision here, this Court criticized the Federal Power Commision's eagerness to issue a license under the Federal Power Act without first determining whether the proposed

project was really needed, *Udall* v. *F.P.C.*, 387 U.S. 428. "We cannot assume," said the Court, "that the Act commands the immediate construction of as many projects as possible," 387 U.S. at 449. So here, the Commission's goal cannot be merely the certification of as many sales as possible, but must be the certification of only those sales which are required by the public interest.

II. THE COMMISSION MAY NOT, IN CERTIFICATING NEW SALES, ELEVATE ITS PREVIOUSLY DETERMINED IN-LINE LEVEL BY REFERENCE TO CONTRACT PRICES, TEMPORARILY CERTIFICATED PRICES, OR GUIDELINE PRICES.

In each of the three in-line opinions here under review, the Commission held that upon the issuance of the September 1960 policy statement the in-line level for each of the three Texas Gulf Coast pricing areas escalated by 1¢ per Mcf—from 15¢ to 16¢ in Districts 2 and 4, and from 16¢ to 17¢ in District 3.[11] On appeals

[11] While the object of our attack in these appeals is the Commission's *elevation* of its previously determined in-line levels, we would like to make clear that even the prior levels were unduly generous and in excess of the levels we had originally supported. As a matter of logic, we submit that the most appropriate line to be held was the line obtaining in June 1954, when the Commission first began to exercise its regulatory jurisdiction over producers; as noted *supra*, p. 6, the average price of gas in the Texas Gulf Coast in 1954 was approximately 10¢ per Mcf. By the time the first post-*Catco* Texas Gulf Coast certificate proceedings came to hearing in the late '50's and early '60's, however, prices had escalated to 14.6¢ per Mcf, and the Commission ultimately fixed an in-line level for Districts 4 and 2 of 15¢ per Mcf, and for District 3 of 16¢ per Mcf, see cases cited *supra*, pp. 7-9. Significantly, in the important Southern Louisiana pricing area—the Louisiana Gulf Coast—the Commission made its original in-line determination by reference to 1954-56 contracts, *Continental Oil Co.*, 27 FPC 96 (1962), and it has held that original line consistently, without escalation, in all Southern Louisiana cases since, see, *e.g.*, *Tennessee Gas Pipeline Co.*, Op. 528, 38 FPC — (Sept. 26, 1967).

by the consumer interests, the Tenth Circuit affirmed the Commission's action in *Amerada* (District 4), and the District of Columbia Circuit reversed the Commission's action in *Hawkins* and *Sinclair* (Districts 3 and 2). Both courts noted that, in finding the post-1960 in-line level, the Commission had departed from its prior practice of relying only upon permanently certificated prices that were not suspect and had, in the present cases, relied on uncertificated contract prices, temporarily certificated prices, and the guideline prices contained in the Commission's policy statement. Both courts accepted the Commission's premise that these untested and essentially unregulated prices reflected current market conditions. But whereas the Tenth Circuit believed that this factor jutified the use of such prices and the consequent escalation of the in-line level, the District of Columbia Circuit held that the use of such prices was barred by the essential purpose of in-line pricing, which was to protect the consumer from the effects of the unregulated market place.

At the outset of our discussion, we would stress that in-line pricing, though only an interim regulatory device, remains of enormous importance so long as just and reasonable rates are not fixed by the Commission. It may be noted that, under its area rate-making approach, the Commission has thus far fixed just and reasonable rates for only one area—the Permian Basin —which covers about 10% of natural gas production. For the remaining 90% of natural gas sold in interstate commerce, in-line pricing continues to be the only effective regulatory control. And because every cent

per Mcf translates itself into millions of dollars,[12] the controversy has been intense.

Despite the controversy, there is no disagreement that the Federal Power Commission may certificate new sales of gas in interstate commerce only where the proposed price is "in-line". "The question is," as Judge Bazelon noted in the *Hawkins-Sinclair* appeal, "in line with what?" (373 F.2d at 824, App., *infra,* 1a). The producers, the majority of the Commission, and the Tenth Circuit believe that new sales should be certificated at prices that are in line with current, essentially unregulated market levels, as measured by the prices currently being negotiated for proposed sales, the prices contained in *ex parte* temporary certificates, and the guideline prices contained in the Commission's policy statement. The consumer interests, the examiners in *Amerada* and *Hawkins,* the Commission staff, the dissenting Commissioners and the District of Columbia Circuit believe that new sales should be certificated at prices that are in line with existing prices that have been tested by the regulatory process, *i.e.,* prices which have previously received permanent certification following hearing, and which are not suspect because they are under judicial review or otherwise. We believe that the legal necessity for the latter standard is persuasively demonstrated by Judge Bazelon's lucid and

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[12] As the then Chairman of the Commission noted in September 1961 (see 31 FPC 655; I R. 5330):

> "A difference of a cent a thousand cubic feet is equal to $130,000,000 a year. A cent a thousand difference in the value of the estimated proven reserves is equal to approximately 2½ billion dollars . . . . These are indeed astronomical figures, even in Texas, so large that in computing them I checked several times to be sure I was not running in an extra string of zeros."

comprehensive discussion of the in-line issue in his *Hawkins-Sinclair* decision; and that discussion is included as an appendix to this brief. While we do not believe we can improve on Judge Bazelon's reasoning, we attempt, in the succeding paragraphs, to emphasize certain aspects of his opinion as it analyzes and rejects the Commission's approach.

We begin with Commissioner Ross' critique of the Commision's 16¢ determination in *Amerada* (31 FPC at 644; I R. 5800):

> "The principal error of the majority is found on page 14 [31 FPC at 634; I R. 5785] where it lists those contracts on which it bases its in-line conclusion. Of the 38 contracts listed having prices in excess of 15¢, 36, or about 95 percent, *are the very contracts whose price is being investigated in this case.* This type of bootstrap rationalization is legally indefensible." (Emphasis in original.)

The Tenth Circuit, in approving the Commission's standard, held (370 F.2d at 189; I R. 6722):

> "An-in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections to them."

Commenting on the Tenth Circuit's standard, Judge Bazelon declares (373 F.2d at 828-29; App., *infra,* p. 11a):

> "Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This

> recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need."

Indeed, as Judge Bazelon correctly points out (373 F.2d at 829; App., *infra*, p. 13a), the very purpose of Section 7 negatives the Tenth Circuit's current market price approach:

> "The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions, unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. . . . But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection."

Judge Bazelon also observes, as Judge J. Skelly Wright had in an earlier in-line appeal,[13] that maintaining an in-line price at the level fixed in earlier cases in no way results in a price freeze,[14] since under

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[13] *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677 at 679 (D.C. Cir. 1963). The Tenth Circuit expressed its disagreement with Judge Wright's formulation (370 F. 2d at 189-90; I R. 6723-24).

[14] The difference between freezing the in-line price—i.e., the initial price at which a certificate is issued—and freezing the effective price the producer may collect should be noted. No party in this proceeding has suggested freezing the effective price.

Section 4 of the Act a dissatisfied producer can file and, within six months at most, make effective his original contract price; this higher price is subject to refund, however,

> "if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices." (373 F.2d at 825; App., *infra*, p. 5a; footnote omitted.)

Thus, while the logic of in-line pricing, as correctly found by the D.C. Circuit's decision (373 F.2d at 830; App., *infra*, p. 13a),[15]

> "may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act, [t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing."

In concluding on the in-line issue, we would note that the Commission at no point found that the prior in-line levels would not bring forth adequate supplies of gas,[16] or that the elevated in-line levels would bring forth greater supplies of gas, or that the consumer was entitled to less protection from potentially excessive initial prices under contracts dated after September 28, 1960 than from potentially excessive initial prices under contracts dated prior thereto.

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[15] See note 14, *supra*.

[16] It is generally accepted that the 1960-64 period to which the elevated in-line prices were applied was a period of excess supply.

III. THE COMMISSION HAS BOTH THE POWER AND THE DUTY, ON PERMANENT CERTIFICATION, TO REQUIRE CERTIFICATE APPLICANTS TO REFUND EXCESS AMOUNTS COLLECTED UNDER TEMPORARY CERTIFICATES.

Section 7(c) of the Natural Gas Act provides that no person may commence a sale of natural gas in interstate commerce without first obtaining a certificate of public convenience and necessity from the Federal Power Commission; the section further provides that a certificate shall issue only after a hearing on the application and that the Commission shall afford notice of such hearing to the interested public. It has been through the operation of these provisions that the present parties have been able, over the years, to challenge proposed initial prices which appeared to be inconsistent with the public interest because they were out of line or were potentially excessive, and it has been through the operation of these provisions that we and other consumer interests have been able to secure judicial relief, in *Cities Service* and the subsequent cases, when the Commission has certificated out-of-line prices.

At about the time that consumer interests were first challenging the FPC's unconditional certification of out-of-line prices, the Commission inaugurated the practice of issuing "temporary" certificates as a matter of routine to every producer-applicant who requested one—and in time virtually every producer-applicant included a request for one with his application for permanent certification. Although the statute seems quite clearly to indicate that temporary certificates are to be issued only in cases of emergency to the public,[17] *Al-*

[17] A proviso to Section 7(c) reads:

"*Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing pending the determination of an application for a certificate . . . ."

gonquin Gas Transmission Co. v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953), the Commission in the late 1950's determined that such certificates should be issued for the benefit of the producers, and it accepted, as falling within the definition of "emergency", a producer claim of economic detriment resulting from inability to commence a sale pending the conclusion of the statutorily required hearing.

While the Commission's power to issue temporary certificates under such circumstances appeared rather dubious, the consumer interests—to the extent they knew of such temporaries (and it should be emphasized that temporary certificates are issued *ex parte* by letter from the Secretary, and do not appear in the FPC's regular list of orders)—were at first not unduly concerned, since it seemed clear that there could be no irrevocable injury to the consumer from temporary certification: Prior to its August 1962 *Skelly* decision, the Commission had uniformly and repeatedly held that any error in granting temporary certification could and would be corrected by a refund order on permanent certification. *El Paso Natural Gas Co.*, Op. 335, 23 FPC 369 at 378 (1960), affirmed, *Texaco Inc.* v. *F.P.C.*, 290 F. 2d 149 (5th Cir. 1961); *Socony Mobil Oil Co.*, 26 FPC 532 at 533 n. 1 (1961), 27 FPC 347 (1962); *Texaco-Seaboard, Inc.*, 27 FPC 15 and 482 (1962); *Continental Oil Co.*, Op. 351, 27 FPC 96 (1962).[18] Moreover, because the prices contained in temporary certificates were, by definition, subject to further Com-

[18] In requiring refunds of excess amounts collected under a temporary certificate which contained no express refund requirement, the Commission stated (27 FPC 96 at 110) that the statutory language under which temporaries are issued "appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

mission review, they could not be (and prior to these cases had not been) used in determining the in-line level for other sales.

In *Skelly*, however, the Commission broke with precedent and held, in effect, that a temporary certificate, even if erroneous, did create permanent rights, for it refused to order refunds of those amounts collected under temporary certificates which, upon permanent certification, were found to be in excess of the in-line level; it attempted to justify its result on the ground that the temporaries contained no express refund condition. The present parties, who were intervenors in *Skelly*, appealed that ruling to the D.C. Circuit; at the same time, a second appeal, challenging the FPC's power to issue temporary certificates as a matter of routine, was filed in the same court, and the two appeals were decided by the same panel in January 1964. In its decisions, the D.C. Circuit, while sustaining the FPC's power to issue temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 327 F. 2d 893, held that the Commission was legally obligated to protect the consumer against excessive, out-of-line prices collected under such certificates, *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242; specifically, the court held that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts.

Although the Commission's *Amerada* decision was issued after the D.C. Circuit's *Skelly* decision, the Commission declined to order refunds of the excess amounts, and instead deferred the issue. On appeal, the present parties challenged the Commission's failure to order refunds consonant with the D.C. Circuit's opinion in *Skelly;* the producers, on the other hand, as-

serted that the D.C. Circuit's opinion was incorrect, that the FPC had no power to require refund of the excess amounts collected under the temporary certificates, and that as a result the Commission had no power to sever the issue out for later determination. The Tenth Circuit decided in favor of the producers. Subsequently, it reaffirmed its decision by summarily reversing the Commission's July 1966 *Amerada* refund order.

While we can agree with the Tenth Circuit that it would have been preferable for the Commission, in issuing temporary certificates to producers, to include an automatic refund provision,[19] we fail to see how the Commission's failure to include such a provision in a temporary certificate, granted *ex parte* at the request of and for the sole benefit of the producer applicant, should result in the producer's gaining any permanent right, as against the consumer, to retain excess amounts collected under the temporary authorization.

Given the nature of temporary certificates, it necessarily follows that the Commission not only has the power but the duty to require refunds of excess amounts collected thereunder, and neither the power nor the duty is attenuated merely because the Com-

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[19] By Order No. 336, 28 Fed. Reg. 2844, effective February 1967, the Commission added § 2.63 to its Rules and Regulations, 18 CFR § 2.63, which provides as follows:

> "For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended (§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower . . . ."

mission neglected, in bestowing the benefit of a temporary certificate on a producer, to include an express warning that refund of amounts in excess of the in-line level would have to be made on permanent certification, *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963. Indeed, if temporary certificates were held to create permanent, irrevocable rights, not subject to modification upon permanent certification, then the temporary certificates themselves would be of dubious validity, cf. *Public Service Commission of New York* v. *F.P.C.*, 327 F. 2d 893 (D.C. Cir. 1964).

This Court recently sustained the Commission's power to order refunds of out-of-line amounts in similar circumstances on reasoning directly applicable. In *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965), the issue was whether refunds should be ordered of out-of-line amounts collected under unconditioned permanent certificates while the certificates were under judicial review. The Court stated:

> "While the Commission 'has no power to make reparation orders' . . . it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. . . . An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U.S. at 229-30 (citations and footnote omitted).

So here, a temporary certificate is, by its nature, not a final order, and the Commission retained the power to undo what was wrongfully done by virtue of the temporary authorization.

CONCLUSION

For the foregoing reasons, the consumer-distributor group respectfully requests this Court (1) to affirm the judgment of the Court of Appeals for the District of Columbia Circuit (Nos. 111, 143, 144, and 231), (2) to vacate the judgments of the Court of Appeals for the Tenth Circuit (Nos. 60, 61, and 62, and Nos. 80 and 97), and (3) to remand the Tenth Circuit cases to that court with directions to remand the proceedings to the Commission on the in-line issue and to affirm the Commission on the refund issue.

Respectfully submitted,

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December 13, 1967

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent*

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On Petitions to Review Orders of the
Federal Power Commission

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Decided February 7, 1967

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BEFORE BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and TAMM, *Circuit Judge.*

BAZELON, *Chief Judge:*

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II

The In-Line Price

The second major dispute in this case concerns the FPC's determination of the in-line price. Since the CATCO decision, the FPC has been granting permanent certificates of public convenience and necessity only if the price of the gas is in-line. The question is, in line with what? Judging from these and other FPC proceedings, the "line" is determined as follows: First the Commission chooses a time

period and a geographical area which it considers relevant[35] and lists all the prices at which gas was sold at that time and in that area. Then it eliminates prices which are "suspect" either because they are presently under litigation or Commission review or because they are similar to a price under a cloud.[36] When the price array is completed the FPC makes several calculations, for example, the average price, the median price, the weighted average price, and the price at which substantial volumes of gas flowed in interstate commerce. The FPC adjusts some of these prices by assigning differing weights to the various prices which form the price array. At least one Commissioner in our case gave some weight also to a guideline price announced first in 1960 and subsequently revised.[37] The Commission considers these weights and the adjustments, and then picks a price.[38] Here the Commission set the in-line price at 15¢ per Mcf for District No. 2 during the period before the Policy Statement (September 28, 1960) and at 16¢ for the post-Policy Statement period.[39] For District No. 3, the prices were 16¢ and 17¢ respectively.

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[35] Here the area for the *Hawkins* proceeding was Texas Railroad District No. 3, and the area for the *Sinclair* proceeding was Texas Railroad District No. 2. In both proceedings there were two relevant time periods—in *Hawkins* from January 1, 1958, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to January 1, 1964, (post-Policy Statement period), and in *Sinclair* from January 1, 1957, to September 28, 1960, (pre-Policy Statement period), and from September 28, 1960, to March 10, 1964, (post-Policy Statement period).

[36] See, *e.g.*, *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 (1961).

[37] See Commissioner Bagge's concurring opinion in *Hawkins*. H.A. 297.

[38] The proceedings in this case provide some examples of the Commission's methods. See the appendix attached to this opinion.

[39] The pre- and post-Policy Statement periods are described fully in note 35 *supra*.

The petitioners have many disagreements with what the FPC did in this case. Continental and Superior think the Commission should have given more weight to certain 20¢ sales which were permanently certificated, to sales which were temporarily certificated, and to contract prices even before these prices are tested in any kind of certificate proceeding.[40] They also claim that the Commission erroneously considered certain sales at 14¢ and less, erroneously excluded intrastate sales, and erroneously used estimated rather than actual volumes when calculating weighted average prices. In short, they claim that the Commission acted arbitrarily and without any recognizable standards.

New York claims that the FPC should have given no weight to contract prices or to sales made pursuant to temporary certificates, and that it erroneously considered certain permanently certificated prices. New York says these permanently certificated prices were incorrectly determined and therefore should not be allowed to affect subsquent in-line prices.

To properly weigh these claims we must understand the purpose of in-line pricing.

In-Line Pricing

The concept of an in-line price is an artificial one created by the Supreme Court, the Courts of Appeals, and the Commission for the sole purpose of protecting the consumer. Before the concept existed, the FPC usually proceeded in the following way. A producer who wanted to sell gas in interstate commerce applied to the Commission for a certificate of public convenience and necessity under § 7 of the Act. When the certificate was granted, the producer-seller and the pipeline-buyer executed the sale at a

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[40] Their claim that the Commission disregarded these prices cannot be based on the record in this case. See, *e.g.*, S.A. 226 and H.A. 285-86 quoted in the appendix *infra*. The producers' claim is reduced to the contention that not enough weight was given.

price which they had already negotiated. If that price was too high, the FPC, either on its own motion or acting on the complaint of an interested party, could institute proceedings under § 5 of the Act to determine the "just and reasonable" price, after which the producer was forced to lower his price accordingly. However, since § 5 does not provide for refunds, the producer was allowed a "windfall" (with a consequent "squall" for the consumer) during the period between commencement of the sales and the conclusion of the hearing under § 5.[41] Section 5 hearings were long and complicated, and the windfall could be quite large. The ordinary protections of the market place did not exist in this regulated monopoly industry. The producer, of course, was interested in extracting the highest price from the buyer. But the buyer did not have an equal interest in keeping the price down because the price he paid became part of his rate base and was ultimately paid by the consumer.[42] Presumably the consumer did not have any choice except to buy the fuel at the price which was set.[43]

The procedure after the invention of in-line pricing changed in one significant way. Now, when the FPC grants a certificate of public convenience and necessity, a price condition is usually attached. A dissatisfied producer who wants to sell at a higher price can file a new rate schedule under § 4 of the Act subject to his contract with the pipeline.[44] These rates become effective after thirty days unless challenged by the FPC. Even if challenged, the new rates

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[41] *Atlantic Refining Co.* v. *Federal Power Commission, supra* note 6, at 390.

[42] *Atlantic Refining Company* v. *Federal Power Commission,* 115 U.S. App. D.C. 26, 28 at n. 11, 316 F.2d 677, 679 at n. 11, (1963).

[43] *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F.2d 133, 135 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.,* 368 U.S. 823 (1961).

[44] *Cf. Texaco* v. *Federal Power Commission,* 290 F.2d 149, 156 (5th Cir. 1961).

become effective after five months if the Commission has not completed its "just and reasonable" determination by that time. Eventually, then, the producer may charge whatever price he wants.[45] However, by filing under § 4, the producer becomes subject to payment of refunds if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices.[46]

The Use of Contract Prices

From the description of in-line pricing it is evident that the FPC cannot use the prices at which producers and pipelines contract as a basis for setting the price. The need for the FPC, and for a concept like in-line prices, arises primarily because the unregulated market place cannot protect the consumer adequately. Congress created the FPC to protect the consumer from the market place, not simply to reflect it. The Commission should not rely upon prices over which it has not exercised careful control.[47]

One Court of Appeals has viewed the Commission's reliance on contract prices as the reason for the CATCO opinion.

> [W]e perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the [following] criticism . . .: that the Commission was permitting

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[45] The Commission may, however, impose a temporary moratorium on price increases. See *United Gas Improvement Co.* v. *Callery Properties, supra* note 31. A price moratorium was imposed in the instant case, but it is not before us on appeal.

[46] The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. *Atlantic Refining Co.* v. *Public Service Commission, supra* note 6, at 388.

[47] See *Atlantic Refining Company* v. *Federal Power Commission, supra* note 42, at 28, n. 11, 316 F.2d at 679, n. 11.

> the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned,* that they had been bargained for at arm's length, or that they were not higher than a price someone else was then paying in the area.[48]

And this court has been wary of allowing the Commission to avoid its responsibility by relying on prices negotiated in the market place.[49]

The Use of Temporary Certificates and the Policy Statement

If the Commission relies on prices over which it has never exercised control, it effectively abdicates its responsibility to protect consumers. Although prices contained in temporary certificates are not completely without Commission control, neither are they subjected to thorough consideration. According to the statute, temporary certificates are granted only "in cases of emergency" pending determination of an application for a permanent certificate. Temporaries are granted in *ex parte* proceedings "without notice or hearing."[50] No record is made, so it is impossible for a court to know on what basis the Commission granted the certificate. Accordingly, standards on review are minimal. This court has upheld a temporary certificate

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[48] *United Gas Improvement Co.* v. *Federal Power Commission, supra* note 43, at 135-36. [Emphasis in the original.] See also *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F.2d 147, 148 (5th Cir.), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.,* 366 U.S. 965 (1961).

[49] *Public Service Commission* v. *Federal Power Commission,* 109 U.S. App. D.C. 289, 291, 287 F.2d 143, 145 (1960), and *Public Service Commission* v. *Federal Power Commission,* 109 U.S. App. D.C. 292, 296, n. 4, 287 F.2d 146, 150, n. 4 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Public Service Commission,* 365 U.S. 880 (1961).

[50] 15 U.S.C. § 717f(c) (1964).

although we admitted that the summary nature of the proceeding precluded us from passing intelligently upon the parties' contentions.[51]

Recently, though, the FPC has attempted to make temporary certification a more considered decision. In 1960 it promulgated a Policy Statement which included guideline prices beyond which it would not certificate sales, even temporarily. In theory, the Policy Statement could justify inclusion of temporary certificates in the permanent certificate price array, since the Policy Statement could provide some degree of intelligent control over temporary prices.

In fact, however, the Policy Statement has not had a curative effect. The FPC itself seems to give the Statement very little (and very ambiguous) weight. In its first statement, the FPC said that "these price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights."[52] When the State of Wisconsin petitioned this court to review the Policy Statement, the FPC moved for dismissal on the ground that the Policy Statement "does not modify the procedures under which certificates are granted. . . . It denies no rights and imposes no obligations."[53] We agreed and dismissed Wisconsin's petition for review.[54] The Commission has repeatedly held

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[51] *Public Service Commission* v. *Federal Power Commission*, 117 U.S. App. D.C. 195, 199, 327 F.2d 893, 897 (1964). See also *American Liberty Oil Co.* v. *Federal Power Commission*, 301 F.2d 15 (5th Cir. 1962). And see *Public Service Commission* v. *Federal Power Commission, supra* note 28, at 294, 329 F.2d at 249, in which this court characterized temporary certificates as being "without notice or hearing or mature consideration."

[52] 24 FPC 818, 819 (1960).

[53] *Wisconsin* v. *Federal Power Commission*, No. 16118 Motion to Dismiss, p. 2 (1961).

[54] *Wisconsin* v. *Federal Power Commission*, 110 U.S. App. D.C. 260, 292 F.2d 753 (1961).

that the Policy Statement does "not purport to fix the 'in-line' price." [55] And recently the Commission characterized the guideline prices as being relevant only when "no protests or petition to intervene [are] filed" in the certification proceeding.[56] In the instant case, only one Commissioner relied upon the guideline prices; two ignored them, and two felt that reliance upon the Policy Statement would be impermissible.

Further, we cannot know whether the guideline price actually controls temporary prices unless we know what the guideline price is based on. For example, it is conceivable that temporary certificates have significant influence upon the guideline price. If so, the guidelines do not control temporary prices. In any event, it is impossible to determine how the guidelines were set. The Commission listed a number of very general factors but was not specific about what the factors were or how they were considered. When asked, the FPC refused to disclose the basis for its determination.[57]

A still more persuasive reason for eliminating temporary prices from the permanent price array is the way their use may injure consumers. The effect may be a slow escalation of in-line prices: An in-line price is set; the guideline price is set somewhat higher; temporary certificates are granted at the guideline price; the new temporary certificates are used in determining a new in-line price, which will be higher than the first in-line price; the new in-line price raises the

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[55] *Amerada Petroleum Corp.*, 29 FPC 171, 172 (1963), *Union Texas Petroleum*, 29 FPC 273, 275 (1963), *Union Texas Petroleum*, 29 FPC 733, 734 (1963).

[56] 30 Fed. Reg. 4670, 4671 (1965). See also *Amerada Petroleum Corp., supra* note 55, at 172 and *Union Texas Petroleum*, 29 FPC at 275 (1963).

[57] See, *e.g.*, Nos. 7781, *et al.*, *Sunray DX Oil Co.* v. *Federal Power Commission*, (10th Cir. Dec. 9, 1966), Op. pp. 15-19; *Amerada Petroleum Corp., supra* note 55.

guideline price; and then the spiral begins again. Although, in fact, we cannot isolate so clearly the effect of the temporaries and the guidelines, there can be no doubt that an escalation has occurred, and in a manner similar to the process described.[58] This process contradicts CATCO's admonition to hold the line in the interim period between the sale of gas and the determination of just and reasonable rates. According to CATCO, one reason why the consumer needs protection during the interim period is that the period is often long.[59] Under the present administration of the in-line price doctrine the amount of protection for the consumer decreases as the length of the interim period increases. The longer it takes to determine a just and reasonable price, the higher the in-line price becomes, and the consumers' potential refund drops accordingly.

There is a final, and completely separate, reason why temporary prices should not affect the in-line price. The first court to discuss in-line prices held that prices which

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[58] In *Texaco Seaboard*, 29 FPC 593 (1963), the Commission found the Texas Railroad District No. 3 in-line price to be 16¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 17¢. 29 FPC 590 (1963). Now the Commission finds that the in-line price for District No. 3 has jumped to 17¢.

In *Hassie Hunt Trust*, 30 FPC 1438 (1963), the Commission found the District No. 2 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 30 FPC 1435 (1963). Now the Commission finds that the in-line price for District No. 2 has jumped to 16¢.

In *Skelly Oil Co.*, 28 FPC 401 (1962), the Commission found the District No. 4 in-line price to be 15¢ for the period preceding September 28, 1960. At the same time, the Commission set its guideline price at 16¢. 28 FPC 441 (1962). Recently the Commission found that the in-line price for District No. 4 has jumped to 16¢. See *Sunray DX Oil Co.* v. *Federal Power Commission*, *supra* note 57.

[59] *Supra* note 6, at 389.

were suspect because they were under a cloud of court or Commission review could not be used in the permanent price array.[60] Since then almost every court,[61] including the Supreme Court,[62] has accepted the suspect price doctrine. The suspect price doctrine clearly includes temporarily certificated prices. Temporarily certificated prices may be, and often are, changed by the Commission. They are "subject to judicial review."[63] Prices that are so particularly subject to the hazard of change do "not provide a reasonably reliable basis upon which to predicate a price line."[64] And, acceptance of temporarily certificated prices has, in fact, had the effect of "creating a standard by which the questioned rates [are] judged."[65]

The producers argue, contrary to our holding, that temporarily certificated prices and contract prices must influence the in-line price. They rely on suggestions in some opinions that the line should "reflect current conditions in the industry."[66] This argument was adopted recently by the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*[67] which held that it is permissible for the FPC to consider temporaries and contract prices.

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[60] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 36.

[61] See, *e.g.*, *Public Service Commission* v. *Federal Power Commission*, 109 U.S. App. D.C. 292, *supra* note 49 and *Public Service Commission* v. *Federal Power Commission*, *supra* note 28.

[62] *United Gas Improvement Co.* v. *Callery Properties*, *supra* note 31, at 227.

[63] *Ibid.*

[64] *United Gas Improvement Co.* v. *Federal Power Commission*, *supra* note 36, at 824.

[65] *Ibid.*

[66] See, *e.g.*, *ibid.*

[67] *Supra* note 57.

However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated.[68] On this basis the court refused to apply the suspect price doctrine and approved the FPC's method of determining the in-line price. "[W]hen no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries."[69] In our case there is a substantial volume moving under permanent certificates.[70] We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.

Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need.

We are not suggesting, of course, that current conditions are never relevant to the FPC. In a § 4 or § 5 hearing the FPC considers current conditions in order to set a just and reasonable price. However, the courts have already rejected attempts to import standards relevant to § 4 and § 5 hearings into §7 hearings. For example, in *Callery* the producers tried to introduce economic and financial evidence, but the FPC disregarded it.[71] The Fifth Circuit re-

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[68] *Supra* note 57, at Op. p. 24.

[69] *Supra* note 57, at Op. p. 26.

[70] See, *e.g.*, H.A. 282, 284-86, 299-300; S.A. 220, 223, 226-27.

[71] See *Callery Properties* v. *Federal Power Commission*, 335 F.2d 1004, 1009 (5th Cir. 1964), for a description of the evidence.

versed the Commission. In essence the court said that this evidence was relevant to current conditions in the industry, and that these conditions were relevant to the determination of the in-line price.[72] The Supreme Court rejected this argument summarily. "To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices."[73] In the recent Tenth Circuit case the producers tried to introduce the same kind of evidence. The court responded:

> The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity.[74]

We think this response, which is properly based on the logic of *Callery* and CATCO, is inconsistent with the same court's acceptance of temporaries and contract prices. If the courts and the FPC will not allow consideration of evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions.

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[72] *Id.* at 1013.

[73] *Supra* note 31, at 227-28. In CATCO the Supreme Court had already recognized the difference between the standards of a § 7 and a § 4 or § 5 proceeding. "[T]he Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." *Supra* note 6, at 390.

[74] *Supra* note 57, at Op. pp. 14-15.

The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current conditions unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. For example, in a particular case, the FPC may feel that an in-line price which is too low subjects the producers to too much risk. And this risk may endanger investment in the industry. In that event the FPC would have to weigh this danger against the diminution of consumer protection. But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price, without attempting to justify the decrease in consumer protection.

Finally, it is argued that elimination of temporarily certificated and contract prices from the price array will cause a "price-freeze." But our proposed decision will not freeze the price of gas. If the producer is dissatisfied with the in-line price he can file a new, and higher, rate schedule under § 4 of the Act.[75] Neither will our decision permanently freeze the in-line price for an area. We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under § 4 or § 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing. But we do not hold that the FPC can never raise the price line in the interim period. We hold only that the Commission has advanced no reason why an escalation is justified in this case.

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[75] See note 45, *supra*.

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JOHN F. DAVIS,

Nos. 60, 61, 62, 80, 97, 111, 143, 144, and 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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v.

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REPLY BRIEF FOR CONSUMER-DISTRIBUTOR GROUP

The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York, Petitioners in No. 62, Respondents in Nos. 111, 143, 144, and 231

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I. THE NEED ISSUE

In its *Hawkins* and *Sinclair* orders here under review, the Commission reached the ultimate conclusion that the sales of gas proposed by the producer applicants were required by the public convenience and necessity (34 FPC at 905-06, III R. 7301; 34 FPC at

941, IV R. 4188), but because there was no evidence of record to demonstrate that the consuming public had any need for the gas, the Court of Appeals for the District of Columbia Circuit reversed. In its brief to this Court, the Commission, while not denying the absence of any evidence showing a public need for the gas, defends its action essentially on the ground that the Commission has an opportunity to determine the public need for producer sales in other proceedings (FPC Br. 50-55). Additionally, the Commission suggests that there is something in "the nature of the gas business" that causes a pipeline with a present oversupply to obligate itself to take or pay for additional gas which it cannot presently use (Br. 55). Finally, the Commission echoes the view recently expressed by the Fifth Circuit in the related *Turnbull & Zoch* appeal,[1] but expressly disavowed by the Commission in opposing our pending petition for certiorari from the Fifth Circuit's holding,[2] that the District of Columbia Circuit's ruling would cause administrative difficulties through "duplication of effort and multiplication of parties" (FPC Br. 56).

A. Consideration of Need in Other Proceedings

Commission counsel states that the pipelines' need for gas may be considered by the Commission in two different types of pipeline proceedings (Br. 52-53). The "primary method" is a pipeline's application for authority to expand its system to undertake new sales; "another method" is the so-called budget authority to construct facilities to receive additional purchases.

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[1] *Continental Oil Co.* v. *F.P.C.*, 378 F. 2d 510 at 526, *cert. pending*, Nos. 504 *et al.*, this Term.

[2] Memorandum for FPC, *Austral Oil Co. et al.* v. *F.P.C.*, Nos. 504, 520 and 526, this Term, pp. 5-6.

Accordingly, says Commission counsel (Br. 51), a producer cannot begin the sale of gas in interstate commerce "unless the Commission has at some point authorized the construction of facilities that the pipeline company requires to receive the gas."[3] Commission counsel's reasoning, however, is faulty. In the pipeline expansion case—which, unlike the budget authority, is frequently the subject of contested hearings—the public-need issue is whether there is a public need for the pipeline sale and facilities there proposed, not whether there is a public need for the reserves which the pipeline has attached as a result of a prior producer certificate case; and the sole question relating to supply is whether the reserves are *adequate* to make the proposed sale feasible, not whether they are *excessive*. Indeed, the fact that a pipeline has a financially burdensome oversupply is regarded by the Commission as a factor tending to justify an otherwise questionable sale.[4] The budget-type authority provides even less of a check on pipeline supply; the whole purpose of the Commission's Regulation governing budget-type authority is to permit the Commission to grant advance authorization for undesignated and unspecified minor construction projects *without*

[3] Although Commission counsel charges the court below with having "overlooked" this "crucial consideration" (Br. 51), one reason the court may have "overlooked" it is that counsel failed to make this point below. Moreover, the statement is incorrect; where, for example, increased deliveries to the pipeline are to be made at an existing delivery point, no additional pipeline authority is required.

[4] See, e.g., *United Gas Pipe Line Co.*, 34 FPC 1063 (1965); *Midwestern Gas Transmission Co.*, 32 FPC 1087 at 1096 (1964); *Florida Gas Transmission Co.*, 29 FPC 1243 (1963); *Trunkline Gas Co.*, 27 FPC 178 (1962), 30 FPC 829 (1963), 32 FPC 1220 (1964).

hearing or investigation, and even the Commission itself has, on occasion, expressed surprise and indignation when the pipelines have used the minor facilities thus blindly authorized as a cover for the attachment of major reserves, see, *e.g., Tennessee Gas Transmission Co.*, Op. 413, 30 FPC 1477 (1963), *aff'd, Tennessee Gas Transmission Co.* v. *F.P.C.*, 340 F. 2d 100 (10th Cir. 1964), *cert. denied,* 381 U.S. 950 (1965).

Thus, while it is theoretically true that a review of the pipeline's need for additional gas *could* be made in the pipeline proceedings, the hard fact is that no such review is made, with the result that the pipelines have been encouraged to enter the market and bid in a wasteful and preemptive manner for additional gas supplies, without regard to whether those supplies are actually needed.[5] And although Commission counsel asserts (Br. 55) that

> "the Commission procedure differs from the prescription of the District of Columbia Circuit only in that the agency characteristically makes its primary determination of need in pipeline rather than in producer proceedings,"

the fact is that neither in the record below *nor in any other record* has the Commission determined that the purchasing pipelines need the gas involved here in order to supply their markets or that their markets could not be supplied without this gas. If indeed the Commission had made such a finding in other proceedings, it would have been a simple matter to receive the relevant data in evidence in this proceeding by refer-

[5] The producers are naturally enthusiastic about such preemptive bidding, which artificially enlarges demand and tends to drive up prices; see Brief for Shell Oil Company *et al.*, p. 58: "The pipeline must purchase the gas immediately or lose the entire reserve . . ."

ence to the record in the other proceedings,[6] but no such offer of evidence was made, nor indeed was any finding in any other specific proceeding mentioned by the Commission in its orders here under review. Eight years ago this Court remarked, *Atlantic Refining Co.* v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 at 393:

> "Nor do we find any support whatever in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.' 17 F.P.C. 880, 881. Admittedly any such need was wrapped up in the Commission's action in Docket G-11107, where Tennessee was asking for permission to enlarge its facilities. However, the two dockets were not consolidated and the Presiding Examiner conditioned his approval here on the granting of the application in Docket G-11107, no part of which record is here."

A further major defect in the Commission's suggested procedure that need can and should be considered in pipeline proceedings is that where the pipeline hearing is held subsequent to the Commission's certification of the producer sale, the Commission is likely to feel impelled to find need in order to justify its prior producer certification.[6a] The experience in the one and only case where the Commission actually examined a

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[6] Receipt of evidence by reference to the record in another proceeding is expressly provided for by the Commission's Rules of Practice and Procedure, § 1.26(c)(3), 18 CFR § 1.26(c)(3), and the practice is exceedingly common in FPC proceedings.

[6a] Even if the pipeline hearing were held *before* the producer permanent certificate had issued, the Commission would feel similarly impelled, for it is the Commission's practice to grant the producer temporary certification almost immediately upon the filing of the producer application.

pipeline's need for the gas involved in these proceedings is instructive.[7] Among the 41 sales certificated by the Commission's *Sinclair* opinion here were 17 sales to Lone Star Gathering Company, a newly formed company which proposed to gather the gas for processing and resale to United Gas Pipe Line Company. The Lone Star-United applications were set down for hearing shortly after issuance of the *Sinclair* opinion in September 1965, and although the evidence of United's need for the gas was slight, the Commission held that need had been shown,[8] *Lone Star Gas Co.*, Opinion

[7] The Commission brief (p. 55) states that the New York Commission "participated in two pipeline cases growing out of the producer applications in issue here." One of these is the Lone Star-United case discussed in this section of our brief. The other, *Coastal Transmission Corp.*, G-18338, resulted in the issuance of a permanent certificate in August 1961, 26 FPC 318, after the New York Commission had been excluded, 23 FPC 752, and prior to the time that the Commission, following judicial reversal of its exclusion of New York, entered an order permitting New York to intervene, 26 FPC 531. In any event, the Commission did not find in its order that the pipeline required the producer sales in order to serve its market, and indeed in a subsequent order, 26 FPC 677 at 684, the Commission expressly found that "Coastal can render the service it proposes without the reserves" involved in some 16 of the producer dockets. Moreover, as noted in our initial brief (pp. 23-24), the fact that pipelines were in a serious and costly oversupply situation had not yet come to light at the time of the 1961 *Coastal* opinion. By 1963, however, the Commission itself took note of the fact that Florida Gas Transmission Company (the successor to Coastal) was in a take-or-pay situation, 29 FPC 1243; and that situation has apparently continued to the present day, *Florida Gas Transmission Co.*, 32 Fed. Reg. 14412 (1967).

[8] In a separate opinion, Commissioner Ross pointed out that the Commission's holding was "nothing more than the unhappy product of the majority's failure to consider public need in passing on producer certificate applications in *Sinclair*," 36 FPC at 507. He also noted that in many, perhaps most, cases, "unless the Commission considers the question of public need in connection with a producer application, it will never consider the question," 36 FPC at 509.

505, 36 FPC 497 (1966). However, when the New York Commission, on application for rehearing, pointed out the numerous factual and legal errors underlying Opinion No. 505, the Commission unanimously reversed itself, and remanded the case to the Examiner for further hearings at which United might present evidence of its need for the gas. Rather than availing itself of the opportunity to present evidence, however, United finally conceded that it really had no need, withdrew its application, and abandoned the sale which had commenced some four years earlier under temporary certificates, *Lone Star Gas Co.*, 38 FPC ——, Order Vacating Certificates (Sept. 15, 1967). In its brief to this Court, the Commission asserts (Br. 54) that the certificates were vacated "not because of a lack of need, but because the producers' reserves proved inadequate." It is true that, as the result of an alleged decline in reserves—a decline, incidentally, which was not discovered by the producers until after the Commission had issued both its *Sinclair* and *Lone Star* opinions, after the New York Commission had applied for rehearing of the *Lone Star* opinion, and after the Commission had granted rehearing—deliveries declined from slightly in excess of the 40,000 Mcf per day which had been certificated by Opinion No. 505 and had actually been delivered in 1964 to approximately 33,000 Mcf per day in 1966. But it is difficult to understand, other than as a face-saving device to explain the complete reversal of Opinion No. 505, why if United had a continuing and long-term need for 40,000 Mcf per day, it would voluntarily forego a purchase satisfying the bulk (33,000 Mcf a day) of that need.

The fact that the one pipeline purchaser that *was* asked to prove its need for gas involved in the *Hawkins*

and *Sinclair* dockets was unable to do so, plus the fact that four of the five pipelines purchasing this gas have found themselves in take-or-pay situations sufficiently severe to require the Commission to authorize them to undertake new sales (frequently at prices below their own cost) to relieve the excess supply,[9] plus the fact that the Commission has allowed at least one of the pipeline purchasers to include in its rate base some $22 million for gas paid for but not taken[10] indicate rather clearly that the Commission is failing to afford the consumer adequate protection from excess costs attributable to unneeded gas supplies and that the appropriate time for the Commission to provide such protection is, as the framers of Section 7(c) contemplated and as the court below held, *before* the Commission authorizes the producers to introduce their gas in interstate commerce.

B. Prepayments and "The Nature of the Gas Business"

The Commission's statement that there is something about "the nature of the gas business" which causes pipelines to contract for more gas than they can physically put through their systems is not only "broad and unsupported" (373 F. 2d at 823; IV R. 4300) but is, in our view, factually erroneous. There is certainly nothing inherent in the natural gas business or in purchasing under long-term supply contracts which necessitates payments for gas not taken. Among gas distribution companies—which, like pipelines, purchase under long-term contracts with minimum-take provisions—take-or-pay situations are almost non-existent,

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[9] See note 4, *supra*.

[10] *United Gas Pipe Line Co.*, Op. 428, 31 FPC 1180 at 1186-87, 1191-92 (1964); *United Gas Pipe Line Co.*, 32 FPC 1515 at 1519 (1964).

and even among the pipelines themselves take-or-pay situations of the degree involved here were largely unknown until the 1960's. Indeed, as late as December 1962, the Commission unanimously held that a pipeline that was required to pay for gas not taken pursuant to a take-or-pay provision would not be permitted to pass such costs on to its customers in the form of higher rates, *Texas Eastern Transmission Corp.*, Op. 372, 28 FPC 1035 at 1038. Despite the magnitude of the problem—the Commission's 1965 Annual Report notes that six pipeline companies for whom the take-or-pay problem "was particularly acute" had paid $64,097,456 for gas not taken as of the end of 1964, and the 1966 Annual Report indicates that the prepayment balance increased by over 20% during 1965 to a total of $83,228,800 for thirteen pipelines, FPC, 1965 Annual Report, p. 120; 1966 Annual Report, p. 125—the Commission has never conducted an investigation to determine why some pipelines are in an "acute" take-or-pay situation, whereas others are only in a mild take-or-pay situation, and others have no prepaid balances at all. Instead, as here, the Commission simply continues to authorize new sales to pipelines that may never be able to use the gas.

C. The Administrative Difficulty Argument

The Commission's apparent adoption of the Fifth Circuit's "administrative difficulty" argument has, perhaps, been best answered by the Commission itself in its memorandum filed this Term, in Nos. 504 *et al.*, in opposition to our request for certiorari of the Fifth Circuit's holding. The Commission there stated (pp. 5-6):

> "[T]he District of Columbia Circuit's decision . . . would not impose any significant administrative burden on the Commission . . . ."

D. The Producer Contentions

The foregoing response to the Commission's brief largely disposes of the arguments presented on the need issue by the *Hawkins-Sinclair* producers (Brief for Shell Oil Company *et al.*, pp. 53-66). Four points raised by the producers require additional comment, however:

1. The producers assert (Br. 61) that the Commission's rulemaking Order No. 334, issued January 18, 1967,

> "amply protects the pipeline industry from the incurrence of substantial prepayment balances and from possible forfeiture or loss of the payments through inability to take the gas."

The producers are completely wrong with respect to the incurrence of prepayment balances. Although the rule originally contemplated by the Commission, Notice of Proposed Rulemaking, 26 Fed. Reg. 4615 (1961), would have exercised control over the minimum-take provisions that a producer might place in its sales contract—and it is the minimum-take provisions which cause the incurrence of a prepayment balance—the final Commission order adopted six years later yielded to producer pressures and deleted entirely the provision governing minimum-take provisions; the sole change effected by the rule as ultimately adopted was to require a make-up period of not less than five years for whatever prepayments are incurred. During the five-year period, however, the pipeline will presumably be permitted to include the amount of the prepayments in its rate base.

2. The producers state (Br. 62-63) that in *Hawkins* they "did adduce evidence which demonstrates that the sales involved in these proceedings did not require the

pipeline purchasers to pay for gas which they could never take." The producers' statement requires supplementation. The *Hawkins* producers presented no evidence whatever as part of their direct case on this issue. On cross-examination by Commission staff counsel (who on this issue was aligned with the producers), the producer witness testified that at least two pipelines purchasing in the Texas Gulf Coast had incurred "substantial prepayments for gas not taken" (III R. 971-72). On redirect three days later, the witness testified that she had examined the 1963 annual reports filed with the Commission by the four pipeline purchasers in *Hawkins,* and that two of the four showed no outstanding balance for gas not taken (III R. 1338-39). On recross-examination, however, the witness admitted (III R. 1360-61) that a pipeline can have serious take-or-pay problems long before it actually is forced to pay for gas not taken, *e.g.,* to avoid paying for gas not taken under newer, higher-priced contracts, the pipeline will cut back its takes under older, lower-priced contracts.

3. The producers suggest that the holding of the court below requiring proof of need before a certificate may issue constitutes a "novel theory" (Br. 64). While we think that ordinarily novelty is neither a vice nor a virtue, the novelty here lies not in the court's holding that need must be shown but in the Commission's holding that evidence of need is not required. Indeed, as the *Amerada* record demonstrates (I R. 95-99, 126-27, 1011), all parties including the producers have traditionally recognized that need must either be stipulated or proven, and the Commission's *Hawkins* and *Sinclair* orders mark the first time that the Commission has ever held that a certificate of public convenience and necessity may issue where need is contested and there

is no affirmative evidence to establish a public need for the gas.

4. The producers bitterly attack the *"sua sponte"* nature of the D.C. Circuit's ruling on the conservation issue (Br. 65-66), and they cite a statement made by counsel for the New York Commission at the *Hawkins* pre-trial conference as indicating that the need issue was "narrowly restricted" (Br. 53) and "carefully limited in scope" (Br. 54). We submit that the issue specified by counsel was by no means as limited as the producers would have it; much more important, however, counsel's statement was made as part of an effort to arrive at a stipulation under which part of the need issue might have been disposed of and agreement reached that the balance would be the subject of evidence submitted by the producers. Because of the producers' unwillingness to stipulate, however, and their determination to stand on their legal position that no evidence of public need was required in a producer certificate case (see III R. 64-66), no stipulation was ever reached and the entire need issue was left completely open. If the producers had undertaken their burden of proof on this point and had presented as witnesses officials of the purchasing pipelines to explain their supply and market requirements,[11] it is entirely possible that such testimony would have led into an exploration of the ultimate use of the gas and of the conservation issue generally. The complete failure of the applicants to present any evidence on need, however, effectively foreclosed inquiry into any aspect of need, including the conservation issues.

[11] It may be noted that in pipeline certificate hearings in which the pipeline is seeking authority to undertake new or additional sales, the pipeline applicant normally presents as witnesses officials of its distribution-company purchasers.

In directing the Commission to expand its horizons and to broaden its considerations in passing upon applications for certificates of public convenience and necessity, the Court of Appeals for the District of Columbia Circuit was applying the regulatory philosophy embraced by the Second Circuit in *Scenic Hudson Preservation Conference* v. *F.P.C.*, 354 F. 2d 608 (1965), *cert. denied*, 384 U.S. 941 (1966), and was anticipating the position adopted by this Court last Term in *Udall* v. *F.P.C.*, 387 U.S. 428 (1967),[12] and by the Third Circuit in *Panhandle Eastern Pipeline Co.* v. *F.P.C.*, No. 16499, Nov. 29, 1967. The Third Circuit described the nature of the Commission's role as follows:

> "Proceedings before the Commission are not private law suits in which a plaintiff wins by default if a defendant fails to appear and defend. On the contrary the public interest is always involved and the Commission, as its guardian, must determine in every proceeding whether the certificate applied for is in the public interest or whether that interest calls for some other disposition. The Commission must see to it that the record is complete and that all relevant facts are before it. Udall v. F.P.C., 1967, 387 U.S. 428." Slip op. p. 5.

The policy established by these decisions has been enthusiastically hailed by the commentators, see, *e.g.*, Reich, *The Law of the Planned Society*, 75 Yale L. J. 1227 at 1248-55 (1966); Comment, *Of Birds, Bees, and the FPC*, 77 Yale L. J. 117 at 126-27 (1967).

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[12] See Initial Brief, pp. 25-26.

II. THE IN-LINE PRICE ISSUE

A. The Meaning of "Current Market Conditions"

In its brief to this Court, the Commission defends its reliance on admittedly suspect prices on the ground that "the Commission's essential duty in passing upon the applicant's initial price *is to evaluate market conditions* . . . [in order to fix] a figure that will presumably elicit continuing supplies for the interstate market," and that an "appraisal of current market conditions" requires a reference to suspect prices (FPC Br. 19, 23, emphasis added). To understand the Commission's position it is essential to realize what the Commission means when it speaks of "market conditions" and what factors it means to include when it says it considered "current market conditions".

To begin with, it is clear that the Commission does not mean that it considered the current cost of producing natural gas, either in the abstract or as compared with the cost of producing gas during the period prior to September 1960, when a lower in-line price was found to be appropriate, for there is in fact no evidence of cost in this record, the Commission having ruled such evidence irrelevant to an in-line determination, *Placid Oil Co.*, Op. 398, 30 FPC 283 (1963), *aff'd, United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Further, the Commission does not mean that it considered evidence of the current need of the public for additional volumes of gas, or evidence of the current supply of gas, or evidence of the current relationship between supply and demand, or evidence of the relative needs of, and supplies available for, the interstate and intrastate markets, for again the Commission has ruled such evidence to be irrelevant to an

in-line determination. Finally, and perhaps stemming from the foregoing, the Commission does not mean that it considered whether the in-line price that it set was adequate, inadequate, or more than adequate to bring forth whatever additional supplies, if any, might be needed by the interstate market; notwithstanding the statement of Commission counsel that the Commission was attempting to fix "a figure that would presumably elicit continuing supplies for the interstate market," there is nothing in the Commission's opinion or in the evidentiary record on which that opinion is based which bears on this point.

What the Commission includes in its consideration of "current market conditions" is limited exclusively to the prices being negotiated for proposed new sales and the prices at which the Commission permits proposed new sales to commence under *ex parte* temporary certificates. In its brief to this Court, the Commission does not deny that such prices are "suspect"; nor does it deny that the use of such prices was specifically and repeatedly condemned by four different courts of appeals in the immediate post-*Catco* era on the ground that such prices, being themselves subject to further Commission review, did not constitute a reliable basis for determining an in-line level; nor does it deny that the standard it used in the present cases for determining the in-line level leaves control of the unregulated market price wholly dependent upon the prices allowed by the Commission in unreviewable *ex parte* temporary certificates, which prices are, in turn, fixed solely by reference to the policy guidelines set forth in the Commission's unreviewable Statement of General Policy. What is perhaps most significant of all, the Commission does not contend that the standard

it followed here adequately protects the consumer from the excess prices reached in the unregulated market place.

The Commission's present position thus resurrects the position the FPC originally adopted in 1959, when, in an unsuccessful effort to blunt the effect of this Court's *Catco* decision, it sought to defend its high-priced post-*Catco* certifications on the ground that the various high prices were in line with each other.[13] The several courts of appeals promptly and unanimously reversed, holding that prices which were still subject to further court or Commission review, or were similar to prices still subject to review, could not be used for in-line purposes.[14] On remand, the Commis-

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[13] The Commission's former Solicitor—who had the chief responsibility for defending the Commission's actions in court throughout the 1957-67 period—has recently stated:

> "[I]t is reasonably plain now that on August 10, 1959, . . . it would have saved time and been infinitely better from the point of view of consumers, the pipelines, the Commission, and the producers themselves, if the Commission had then and there heeded the teachings of the Supreme Court's *CATCO* decision. See, e.g., the recapitulation of that story in the Commission's brief in *Pan American Petroleum Corp.* v. *F.P.C.*, CA 10 Nos. 7912 *et al.* (May 16, 1966), pp. 3-5. In the light of that story the Supreme Court's current allotment of 9 hours for argument in the pending 'in-line pricing cases', eight years later, is an eloquent testimonial to the need for objectivity upon the part of the Commission when it has as big a pill to swallow as CATCO." Petition for Rehearing, *International Paper Company*, FPC Docket No. CP68-62, pp. 5-6 n. 5, November 2, 1967.

[14] *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960); *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960); *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961).

sion accepted the courts' admonition and held the line at the pre-*Catco* level, even though this meant ignoring the bulk of gas that was flowing at out-of-line contract or temporarily certificated levels under contemporaneous contracts. This Court affirmed, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965), expressly noting, 382 U.S. at 227:

> "Consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, *no longer subject to judicial review or in any way 'suspect.'*" (Emphasis added.)

Similarly, in two opinions issued after *Amerada* but before *Hawkins* and *Sinclair*, the Commission unanimously held that for the Southern Louisiana sales there involved the in-line price after the September 1960 policy statement continued at precisely the same level it had been prior to 1956, when the *Catco* contracts were executed, *Union Texas Petroleum*, Op. 436, 32 FPC 254; *Superior Oil Co.*, Op. 437, 32 FPC 241. Indeed, the Commission expressly held that "an in-line price, once established, is presumed to continue until substantial evidence is presented that it has changed," 32 FPC at 243. In continuing the prior in-line level, the Commission gave no weight to, but rather regarded as suspect, all contract prices, all temporarily certificated prices, and even those permanently certificated prices at levels above that fixed in the remanded *Catco* proceedings; it did this even though by so doing it totally ignored what it now refers to as "current market conditions". Further, for the crucial offshore Louisiana area, the Commission refused to accord any weight to suspect prices even though there were *no* perma-

nently certificated sales under contracts dated after the policy statement, 32 FPC at 263. For both onshore and offshore areas, the Examiner had found, and the Commission made no contrary finding, that the producers' contract prices were in line with the prevailing market price, but he held this to be legally irrelevant:

> "Our main interest, following the directions of *Catco,* is to halt, rather than follow, the trend of the . . . market." 32 FPC at 300.

We submit that there is no rational basis for applying a different rule to the Texas Gulf Coast area than is applied to the Southern Louisiana area. The Natural Gas Act is national in scope and requires the same high degree of consumer protection for all producer sales.

B. The Claimed Justification for Relying on Suspect Prices

The Commission seeks to justify its reliance on suspect prices on the theory that the court decisions barring the use of suspect prices contain an inherent contradiction. This contradiction arises, according to Commission counsel, because the decisions direct the Commission to keep the in-line price "at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect' ";[15] yet there may be instances where there are no substantial amounts of gas being sold under non-suspect certificates. Under such circumstances, Commission counsel says, to honor the prohibition against considering suspect prices would preclude

[15] *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 at 227 (1965); see also *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 at 824 (9th Cir. 1960).

the Commission from honoring the directive that it consider prices at which substantial amounts of gas have been certificated to enter the market. This conflict—which the Commission purports to resolve by giving suspect prices a "discounted" weight[16]—is wholly contrived.[17] Although Commission counsel relies primarily for his "conflict" theory on language from the Ninth Circuit's 1960 *UGI* decision,[18] the holding in that case was that the Commission could not use suspect prices even where, as was true there, the suspect prices represented the major portion of the gas being sold under contracts contemporaneous with the certificates under review, 283 F. 2d at 824. Moreover, the court was emphatic in holding that prices subject to further Commission review (such as contract prices not yet certificated and prices temporarily certificated) could not be used for in-line purposes, *Ibid.* As the D.C. Circuit, endorsing the Ninth Circuit's standard, subsequently explained:

> "Where the inquiry is whether a particular proposed price is inflated, it serves no purpose to refer

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[16] Although the Commission states that the weight it gives suspect prices is "discounted", there can be no question that that "discounted" weight is decisive. Thus, for example, in its *Sinclair* opinion, the Commission expressly stated (IV R. 4181, emphasis added):

> "In reaching this result [that 16¢ represents the in-line price for the post-policy statement period] we may observe that *if we confined ourselves to permanently certificated sales we would not find a line as high as 16 cents,* for the next highest sales are at the 15.25 cents level."

[17] The Commission was apparently not troubled by any such conflict when it decided *Union Texas,* some five months *after* its *Amerada* opinion here under review. See pp. 17-18, *supra.*

[18] See note 15, *supra.*

> to other prices which may be equally inflated." *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 at 149 (D.C. Cir. 1960).

Significantly, the Ninth Circuit specifically addressed itself to the possibility that in some situations there might be few, or perhaps no, non-suspect prices that could serve as a reference point for an in-line price; in outlining the standards to be followed in such situations, the court made absolutely no mention of suspect prices, even on a discounted basis:

> "Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, however, relative production costs, need, competition between pipeline companies, and no doubt other factors become significant." 283 F. 2d at 823.

C. The Rationale of the Commission's Elevation of the In-Line Level

In a dazzling display of *post hoc* improvisation, Commission counsel argues (Br. 29-35) that although the evidentiary record in each of the three proceedings—*Amerada, Hawkins,* and *Sinclair*—was radically different, in each there was some reason for giving weight to suspect prices, and that in each instance the effect of giving weight to suspect prices was to elevate the previously determined in-line level for the particular pricing area by exactly 1¢ per Mcf—an amount which, presumably by sheer coincidence, brought the new in-line level into precise accord with the guideline level that had been announced before the respective hearings began. The Commission's present explanations of its actions are entirely inconsistent and unpersuasive. Thus, in *Amerada,* the Commission asserts that it relied on the prices in the contracts then before

it for certification and on temporarily certificated prices because only a small percentage of the gas contracted for between September 1960 and August 1962 had been permanently certificated.[19] But in *Hawkins* and *Sinclair,* where there were admittedly substantial volumes that had been permanently certificated, the Commission nonetheless continued to rely on suspect prices.[20] Moreover, the Commission's *Amerada* reasoning, even assuming that suspect prices may be relied on, is strange: The Commission points to the fact (I R. 5786; Br. 30-31) that the average contract price had risen by 4.1% (from 16.5¢ to 17.17¢) in the period following issuance of the policy statement as the basis for raising the in-line price by 6.7%, a procedure which the Commission asserts (Br. 35) is part of its attempt "to follow this Court's command to aim 'at keeping the general price level relatively constant' ".

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[19] There were, of course, very substantial volumes of gas being sold in District 4 during this 1960-62 period under contracts dated prior to September 1960 at average prices well under the in-line price determined by the Commission. For reasons which are not wholly clear and which are probably not wholly valid, the Commission, in determining in-line prices, has looked not to contemporaneous sales, but to contemporaneous contracts. Although the Commission asserts that it has "taken as its touchstone" the Ninth Circuit's 1960 *UGI* decision (Br. 24), there is in fact nothing in that opinion which suggests that the Commission should, in arriving at an in-line price, ignore the vast majority of present sales that are being made under contracts executed prior to the date of the contracts in question.

[20] Commission counsel's representation (Br. 34-35) that the elevation of the District 3 line to 17¢ can be justified by reference to permanently certificated prices (though the Commission did not purport to do so) overlooks the fact that the three sales permanently certificated at 18¢ were all suspect (III R. 7420-21); if these three sales were excluded, the next highest permanently certificated price was 16.5¢.

The reason for the Commission's result in all three of these cases is a good deal less complex than the Commission's brief to this Court would indicate, and the clue to the factor that actually motivated the Commission may be found in Commissioner Ross's dissent in *Amerada,* in Commissioner Bagge's concurring opinion in *Hawkins-Sinclair,* and in Commissioner Black's dissenting opinion in the same case.

In his *Amerada* dissent, Commissioner Ross accurately portrayed the majority's dilemma (I R. 5797-98, 5804):

> "The majority now is faced with a situation of its own making. Apparently they now recognize that the Policy Statement by itself is not sufficient to raise the in-line price . . . . Thus, it now becomes necessary to dream up some other grounds which, by so doing, raise all kinds of other policy considerations and which in the interests of orderly regulation should be pointed out. It could be that this is substantially a case of 'chickens coming home to roost'. . . .
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> * * *
>
> "The majority put itself in a box and closed the top when it inflated a solid in-line price, determined after a hearing, to 16¢ and then remanded those contracts executed after September 28, 1960 for a second hearing. The instant opinion is nothing more than a forced rationalization in support of that earlier position. Obviously, the majority strains to justify a higher price than that decided in *Skelly* and affirmed on appeal. Otherwise, the retrial of those cases would be most embarrassing."

In *Hawkins,* the principal opinion, written by Commissioner O'Connor for himself and Commissioner Swidler, studiously avoided mention of the policy guidelines. Commissioner Bagge, who had just joined the Commission and had not participated in the 1963 re-

vision of the policy guidelines for Districts 2 and 3, concurred in the result, frankly relying on the guideline levels (III R. 7306-07; IV R. 4193). Commissioner Bagge stated that, in his view, it would be desirable if the in-line price could "be made to coincide" with the guideline level, and stated that his determination that the in-line level was 17¢ "recognizes the existence of and takes into account the existing guideline price."

Commissioner Black, with whom Commissioner Ross joined, dissenting, condemned the Commission majority for "affording weight to our guideline policy statement" (III R. 7308), for attempting to support "its predetermined 17¢ level" by reference to the policy guidelines (III R. 7310), and for permitting the in-line determination to be influenced by "our seat of the pants guideline prices" (III R. 7311).

It is highly significant that the Commission majority made no response whatever to these claims of the dissenters, either to point out that the majority opinion did not rely on the policy guidelines or, alternatively, if it did rely on the policy guidelines as the dissenters charged, to articulate and defend that reliance. The reason for this strange hiatus in the majority opinion is readily explicable. The Commission had repeatedly held that the policy statement "did not purport to fix the 'in-line' price," *Amerada Petroleum Corp.*, 29 FPC 171 at 172 (1963); *Union Texas Petroleum*, 29 FPC 273 at 275 (1963); *Union Texas Petroleum*, 29 FPC 733 at 734 (1963), and the reasons that the policy statement could not legally fix the in-line price had been cogently explained by Commissioner O'Connor, the author of the *Amerada* and *Hawkins* opinions:

> "The reason why the Policy Statement cannot effect an automatic approval of proposed rates

must be clear to you. The Policy Statement was issued without hearing. Parties had no opportunity to contest the 'guide line' prices set forth therein. Section 7(c) of the Natural Gas Act requires notice of an application be given and a hearing be held prior to the issuance of a permanent certificate. It is only after notice has been published that potential protestants and interveners are made aware of the prices proposed to be charged in the event a permanent certificate is issued. Thus, those parties who have valid protests must be heard prior to final action on the certificate application. They cannot legally be denied the right to hearing afforded by statute." Address before Eastern District of America Petroleum Institute, Pittsburgh, Pa., May 3, 1963, mimeo. p. 4 (I R. 5339).

But if, as the Commission has thus recognized, it cannot rely on the guideline levels to determine the in-line level, then it necessarily follows that it cannot rely on prices which have been temporarily certificated, for those prices are based on the guideline levels, and can have no greater force than the source from which they are derived. Indeed, in its 1962 *Skelly* opinion, the Commission had held that temporarily certificated prices were suspect, 28 FPC at 409, and hence not usable for in-line purposes. On appeal, Commission counsel explained (Brief for FPC, *Public Service Commission of New York* v. *F.P.C.*, D.C. Cir. No. 17582 *et al.*, p. 15):

"Since the price under a temporary authorization is necessarily subject to review in the hearing on the permanent certificate, temporary authorizations are presumptively at prices that must be regarded as under a 'cloud' . . . . Clearly, absent a showing that temporaries are not at out-of-line prices, such untested prices cannot properly be used to justify the issuance of permanent certificates."

Thus, the real issue presented here is whether the Commission can, by promulgating out-of-line policy statement levels—without notice, hearing, or record, and in an unreviewable, *in camera* proceeding—raise the in-line level by thereafter issuing unreviewable *ex parte* temporary certificates at the policy statement levels. We submit that *Catco* bars such action, for, as Judge Bazelon correctly noted in the *Hawkins-Sinclair* appeal, the use of guideline prices to determine temporarily certificated prices and of temporarily certificated prices to determine the in-line levels has led to "an esclation of in-line prices" which "contradicts CATCO's admonition to hold the line" (373 F.2d at 827; IV R. 4309-10).

D. The Role of the Consumer Interests in Commission Proceedings

The producers repeatedly assail the consumer interests for intervening in and contesting producer certificate applications involving proposed high prices (Shell Br. 6-8, 13, 19-26; Sunray Br. 11, 25). They contend that but for such intervention, the Commission would have granted unconditional certification to the producer applicants, without the necessity for lengthy hearings—indeed, without the necessity for any formal hearing at all.[21] In voicing this complaint, the producers clearly reveal that their difficulty is not with the intervenors but rather with the statutory scheme, which

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[21] But *cf. Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 3rd Cir. No. 16499, Nov. 29, 1967, slip op. p. 5:

> "Panhandle had no right to have its application granted merely because no one had protested or intervened in opposition within the period fixed by the Commission for such action. Proceedings before the Commission are not private law suits in which a plaintiff wins by default if a defendant fails to appear and defend."

procedurally contemplates intervention and hearing, and substantively contemplates that producer price proposals that are not consistent with the public interest will not be certificated.

The producers further contend that, having obtained intervenor status, the consumer interests adopt a wholly arbitrary approach. Thus, the producers allege (Shell Br. 19-20):

> "The Intervenors determined that a price of 14-15 cents was 'acceptable' to them. No plausible reason has ever been given, either in evidence filed in a Commission proceeding or in any brief filed with the appellate courts, for the selection of this level."

Our position has been stated many times in many cases, and several times in this case. We would invite the producers' attention to the record before the Commission (III R. 7123 n. 1), to the extensive discussion in our brief to the D.C. Circuit, pp. 22-25, 29-34, and to our discussion at page 26, note 11 of our initial brief in this Court. Furthermore, we would note that the levels we are urging in this case are not "our" levels but are the levels the Commission had originally set, after hearing, as in-line for the area involved; as we have previously noted (Initial Br. 26 n. 11), the Commission's levels were in excess of the levels we had initially supported.

The producers also suggest (Shell Br. 38 n. 77) that the intervenors have been inconsistent in that the rate recommendation proposed by some members of the consumer-distributor group in the pending Texas Gulf Coast Area Rate Proceeding calls for rate ceilings slightly in excess of the in-line levels found by the Com-

mission here. The producers fail to point out that the rate ceilings they cite are part of an overall package; that they would apply only to gas sold under contracts dated on and after January 1, 1963; and that for gas sold under contracts dated prior to January 1, 1963 (i.e., all of the *Amerada* gas and some 90% of the *Hawkins-Sinclair* gas), the ceiling price is 14¢ per Mcf.

III. THE REFUND ISSUE

Because disposition of the refund issue turns on the nature of a temporary certificate—a point we believe has been well covered in our initial brief and in the Commission's brief[22]—we confine ourselves to three brief points in response to the producer contentions.

1. Temporary certificates, which are exclusively for the private benefit of the producer, are issued at a stage in the proceeding from which potential intervenors—who will be called on to pay for any excess charges—are excluded. If this issue could be neatly divided so that the unfortunate consequences of any dereliction on the part of the Commission would be taxed against the Commission, there might be some grain of logic to the producer position. But here, the producers would tax the Commission's failure to be more specific in notifying recipients of temporary certificates that refunds might be required against parties who were not even permitted to be heard on the whole

[22] Much of the Commission's discussion of temporary certificates (FPC Br. 38-50, and see especially 41-43) demonstrates not only that the Commission was right in holding on the refund issue that permanent rights could not be acquired by virtue of an *ex parte* temporary certificate, but also that the Commission was wrong in holding on the in-line issue that the in-line price could change because of prices temporarily certificated.

matter of temporary certification. As the District of Columbia Circuit recently stated:

> "The premise from which we approach this question is that 'the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided.' *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F.2d 52, 55 (4th Cir. 1950)." *Elmo Company, Inc.* v. *F.T.C.,* D.C. Cir. No. 20709, Dec. 27, 1967, slip op. p. 5.

2. The *amicus* brief submitted by Pan American Petroleum, and, in fact, much of the argument made by the producers, represents a distortion of the history of the refund issue. The Tenth Circuit's 1959 *Sunray* decision—*Sunray Mid-Continent Oil Co.* v. *F.P.C.,* 270 F.2d 404—which was briefed and argued at a time when the Commission was defending its unconditional certification of the out-of-line *Catco* prices, hardly has the sweeping consequences now urged by Pan American.[23] The issue of refunds of out-of-line amounts collected under temporary certificates did not become crucial, and there was consequently very little precedent, until the Commission began to make in-line determinations in the early 1960's. As noted in our initial brief (p. 33), the Commission, prior to its August 1962 *Skelly* decision, did *not* follow *Sunray,* but to the contrary did require refunds of excess amounts col-

[23] The Tenth Circuit's decision has never been accepted by the other courts of appeals, but, to the contrary, has been rejected or distinguished both by the Fifth Circuit in April of 1961, *Texaco* v. *F.P.C.,* 290 F.2d 149 at 156-57, and by the D.C. Circuit in January of 1964, *Public Service Commission of New York* v. *F.P.C.,* 329 F. 2d 242 at 250.

lected under temporary certificates. In *Skelly,* the Commission reversed itself and declined to order refunds, and it followed its *Skelly* pattern until January 1964, when the D.C. Circuit reversed the *Skelly* holding. The producers repeatedly cite from Commission orders issued during the erroneous and relatively short-lived *Skelly* period (August 1962 to January 1964) in an effort to demonstrate that the Commission's present policy on refunds is inconsistent with its earlier policy. It is true that the Commission stated many times during that period that it would not require refunds of excess amounts, and it is also true that those statements are inconsistent with the Commission's present rulings that refunds are required. But obviously both the inconsistency and the correctness of the Commission's present position are explained by the D.C. Circuit's reversal of the Commission's no-refund rule in *Skelly.*

3. The producers rely extensively (Sunray Br. 6, 15, 41-42, 44-45, 47, 49, 57-58) on the Commission's February 5, 1963 order (29 FPC 218; I R. 5305) denying intervenors' motion to impose an express condition requiring refund of excess amounts thereafter collected under outstanding temporary certificates, and on the supposed consequences of our failure to petition for review of that order. Although the Commission has correctly analyzed the meaning and consequences of its order (FPC Br. 40-41 n. 28), we believe it may be helpful to note that the motion (I R. 5059-68), made during the pendency of the Commission's *Skelly* no-refund rule, was designed solely to provide partial relief from the harsh results of that rule *in the event Skelly turned out to be valid law* (I R. 5063; see also I R. 79-81). By the time the

Commission ruled on our motion, however, the *Skelly* case was already in the court of appeals, and the successful conclusion of that appeal obviously destroyed not only the basis for the February 5 order, but also the need for the relief denied by that order. In consequence, the appeal from the February 5 order that the producers now insist was indispensable would have been a needless duplication of the broader *Skelly* appeal and would, in all probability, have been subject to dismissal for mootness upon issuance of the *Skelly* mandate.

Respectfully submitted,

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January 8, 1968

Nos. 60, 61, 62, 80, 97, 111, 143, 144, 231

DEC 13 19
JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner*,

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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OPENING BRIEF OF STANDARD OIL COMPANY OF TEXAS, RESPONDENT IN NO. 80

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OPENING BRIEF OF STANDARD OIL COMPANY OF TEXAS, RESPONDENT IN NO. 80

PRELIMINARY STATEMENT

This brief is filed on behalf of Standard Oil Company of Texas, a Division of Chevron Oil Company (Standard), a respondent in No. 80. This case is a companion case to Nos. 60, 61, 62, 97, 111, 143, 144 and 231. Nos. 111, 143, 144 and 231 are separate petitions from

a decision of the Court of Appeals for the District of Columbia. The other cases, from the Tenth Circuit Court of Appeals, arose as follows:

"In a consolidated proceeding seeking permanent certificates for sales of gas from fields in Texas Railroad Commission District No. 4, the Commission, on March 23, 1964—in its Opinion No. 422—ordered permanent certificates at an "in-line" price of 16 cents and severed, for later decision, the question as to whether refunds in respect of sales made under prior temporary certificates would be ordered. Both producers and distributors appealed from this decision. Standard did not challenge the "in-line" price and, therefore, did not participate in that appeal.

Thereafter on July 27, 1966—in its Opinion No. 501—the Commission ordered refunds. Standard and other producers appealed from this decision.

The first appeal to the Court of Appeals (from Commission Opinion No. 422) was decided on December 9, 1966 (I R. 6696-6757). In that decision the Court of Appeals, deeming the refund issue sufficiently before it because of the severance order, decided both the "in-line" price and refund issues. Thereafter, in a *per curiam* opinion filed March 27, 1967, the Court of Appeals decided the refund issue in the second appeal (from Opinion No. 501) on the authority of its earlier decision (II R. 6885-91).

In this Court, Petitions Nos. 60, 61 and 62 seek review of the first decision of the Court of Appeals involving both the "in-line" price and refund issues. Petitions Nos. 80 and 97 (Standard is a party respondent only in No. 80) involve solely the refund question.

STATEMENT OF THE CASE

Standard adopts the questions presented and the statement of the case in the brief filed on behalf of Sunray DX Oil Company, et al., in Nos. 60, 80, et al.

ARGUMENT

Standard adopts the argument on the refund issue in the brief filed on behalf of Sunray DX Oil Company, et al., and respectfully submits the following additional points:

The ruling of the Court below that the Commission lacked power to order refunds under the unconditioned temporary certificates is clearly correct under the principles established by this Court in the *Arizona Grocery* case.[1] In that case this Court held that when a Commission fixes a rate for the future it acts in a quasi-legislative capacity and may not thereafter, acting in its quasi-judicial capacity, retroactively "repeal its own enactment" (284 U.S., p. 389) and award reparations or refunds upon the ground that the rate it fixed was unreasonable.

In the case at bar, the Commission's authorization of the 18 cent price in the temporary certificates was action legislative in character. It approved a rate for the future—in the case of Standard, after reducing the proposed rate on one sale from 19.795 cents to 18 cents per Mcf, and after eliminating a proposed price escalation clause in the contract covering the other sale. The fact that the consideration given by the Commission to the rates under the temporary certificates was not as formal as the consideration which would be given

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[1] *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932).

in a hearing on permanent certification, or in a Section 4 or 5 proceeding, does not alter the legislative character of its action. In the *Arizona Grocery* case this Court noted that the Interstate Commerce Commission had held (284 U.S., pp. 382-383):

> "We reserve the right, upon a more comprehensive record, to modify our previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period."

And in this Court the Interstate Commerce Commission argued (284 U.S., pp. 379-80):

> "In the present case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the prior maximum rates had been authorized, and that the rates here involved were repeatedly under fire of the shippers."

Nevertheless this Court held that the Commission could not award reparations in respect of its own rates, whether "upon the same or additional evidence as to the fact situation existing when its previous order was promulgated * * *." (284 U.S., p. 390)

Further, rates are "Commission made" rather than carrier made, within the principle of the *Arizona Grocery* case, even though no hearing is held, as long as the rates filed by the carriers are made effective by action of the Commission. In *Woodrich* v. *Northern Pac. Ry. Co.*, 71 F. 2d 732 (CA 8, 1934), the Court held (p. 735):

> "It has been observed that the North Dakota statutes confer upon the Commission the legislative function of making, allowing, approving, revoking, and modifying rates. The Board is by positive statute directed to make rates. By order of the Commission, dated January 5, 1922, all intrastate rates then filed were continued in full force and effect until revoked, modified, or suspended by appropriate proceedings. The rates here involved were thereby approved by the Board, and having in effect been prescribed by the Board, and the rates charged having been assessed and collected in compliance with the schedules so approved and fixed by the Board, no award of damages could properly be made * * * Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 * * *."

In the case at bar the Commission did more than merely make effective all rates on file. It dealt with each proposed rate. It provided for refunds in some temporary certificates, and advertently omitted such provisions in others. It approved some rates as filed and reduced Standard's proposed 19.795 cent rate, basing its action upon its then recent determination in the Commission's Statement of General Policy No. 61-1 (24 FPC 818) which had been arrived at after a careful consideration of the facts relating to the industry.

The Commission has contended herein that the "without prejudice" language of the temporary certificates can be read as incorporating a condition giving the Commission the right to order refunds. If the temporary certificates, in fact, provided for the ordering of refunds, the Commission's refund order would not offend the *Arizona Grocery* rule, since the Commission would not be repealing but enforcing its prior legislative act. Whether or not the language used by the Commission in its temporary certificates can be read to authorize a refund involves a construction of that language to arrive at the Commission's intent. Here, the Commission contemporaneously stated exactly what it intended by its own language and removed any possible basis for later speculation. In its order of February 5, 1963 (I R. 5305-5311), the Commission said of its previously issued temporary certificates:

> " * * * the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. * * *
>
> * * * *
>
> " * * * we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate."

CONCLUSION

For the foregoing reasons, and for those stated in the brief filed on behalf of Sunray DX Oil Company, et al., we submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 13, 1967

PREME COURT, U. S.
JAN
JOHN F.

Nos. 60, 61, 62, 80, 97, 111, 143, 144, 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner,*

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL., *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

ANSWERING BRIEF OF STANDARD OIL COMPANY OF TEXAS, RESPONDENT IN NO. 80

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January 8, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

ANSWERING BRIEF OF STANDARD OIL COMPANY OF TEXAS, RESPONDENT IN NO. 80

In addition to the points made in the answering brief filed on behalf of Sunray DX Oil Company, et al., Standard Oil Company of Texas, a Division of

Chevron Oil Company (Standard), respectfully emphasizes the following:

In support of its contention that the Commission had power retroactively to change the rate authorized by the temporary certificates and to order refunds, the Commission quotes and relies upon the decisions of the District of Columbia and Fifth Circuits in *Skelly*[1] and *Continental*[2] (Commission's Brief, p. 45). However, the reasoning of the courts in those cases, as quoted by the Commission, is clearly erroneous. In each case, the court recognized that no specific provision of the Natural Gas Act permits retroactive reduction of a rate unconditionally authorized by a temporary certificate. Nevertheless, the courts implied the existence of such power from the general purposes of the Act.

As noted in the Commission's brief, each court said (329 F.2d at 249; 378 F.2d at 531):

> "* * * The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. * * *"

Thus, the courts *implied* a power to give rates retroactive application in the absence of "clear" statutory

[1] *Public Service Commission of N. Y.* v. *F.P.C.*, 329 F.2d 242 (1964), *certiorari denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964).

[2] *Continental Oil Company, et al.* v. *F.P.C.*, 378 F. 2d 510 (1967).

provisions expressly forbidding such action. This is directly contrary to the principle stated in this Court's decision in *T.W.A.* v. *Civil Aeronautics Board,* 336 U.S. 601 (1949), where this Court held that the power to make rates retroactive will never be implied.

In that case, the question was whether the Civil Aeronautics Board had authority to fix a new mail rate for air carriers and to make it retroactive for a period in which a rate previously fixed by the Board was in effect. The carriers relied upon the words of the governing statute, which empowered the Board to fix rates and "to make such rates effective from such date as it shall determine to be proper." This Court held that even this broad authorization could not be construed to permit the Board to make its new rates retroactive.

Such a construction, the Court held, would be "a radical break with tradition" in the field of rate making (336 U.S. 605). The Court said (336 U.S. 607):

> "In sum a construction which would make it possible to revise rates retroactively to any point of time would be a real innovation which should have a more solid basis than our own predilections. We cannot but feel that if the rate-making power were to be put to such a novel use, the purpose would have been made clear. It is too unprecedented a departure from the conventions of rate-making to rest on mere inference."

And see: *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947); *American Trucking Ass'ns.* v. *Frisco Lines,* 358 U.S. 133 (1958).

CONCLUSION

For the reasons stated above and those stated in Standard's Opening Brief, we submit that the judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE SUPERIOR OIL COMPANY

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IN THE

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OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE SUPERIOR OIL COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia, sub nom *Public Service Commission of the State of New York, Petitioner* v. *Federal Power Commission, Respondent,* No. 19,796, et al., is reported at 373 F. 2d 816 (CADC 1967). The opinion and orders of the Federal Power Commission, H. L. Hawkins and H. L. Hawkins, Jr., Operator, et al., Docket No. G-18077, et al., are reported at 34 FPC 897 (1965) and its opinion on rehearing is reported at 34 FPC 1330 (1965). Joint Appendix III R. 7292-7317 and III R. 7505-7509.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit wherein the Federal Power Commission was reversed and the case remanded to the Federal Power Commission for further proceedings consistent with said judgment was entered on February 7, 1967. On May 4, 1967, Petitioner filed an application for an extension of time in which to file petitions for writ of certiorari with the Chief Justice of the United States requesting therein an extension of time to and including June 8, 1967. On May 8, 1967, this Court issued its order extending time to file petition for writ of certiorari, as requested. On June 8, 1967, a timely petition for writ of certiorari to the District of Columbia Circuit Court of Appeals was filed. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution. The statute involved is the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, particularly Section 7 thereof. The pertinent portions of the respective provisions of the Constitution and the Statute are set forth in Appendix A hereof.

QUESTIONS PRESENTED

The Court below recognized that the concept of an in-line price is an artificial one created by this Court in *Atlantic Refining Company* v. *Public Service Commission of New York* (CATCO), 360 U.S. 378 (1959). The adoption by the Commission of the suspect price

doctrine created by the Ninth Circuit in *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960) and the Commission in-line pricing technique was affirmed by this Court in *U.G.I.* v. *Callery Properties, Inc., et al.*, 382 U.S. 223 (1965). The principles set down by these cases are in conflict with the in-line pricing techniques utilized by the Commission to determine the in-line prices in Railroad District No. 3 for the period 1958-63.

Questions presented are:

1. Is the Commission, in establishing the several in-line prices, obligated to disregard current conditions in the areas which might affect the price levels, when such current conditions are reflected by certain high-priced final permanent certificates, temporary certificate prices, contract prices and the Commission's price guidelines promulgated in its Statement of General Policy 61-1?

2. Does the Commission have discretion to determine an in-line price after elimination of certain final permanently certificated prices and rely entirely upon prices in those final permanent certificates remaining *without reexamining either the prices eliminated or those relied upon by the same standards*?

3. Does the Commission have the discretion to determine an in-line price in this proceeding on the basis of a weighted average price which includes all permanent certificates below 14 cents per Mcf when in prior proceedings the weighted average price used to determine the in-line price was based only on permanent certificate prices at or above 14 cents per Mcf?

4. Is it a requirement of producer applicants, or even the Federal Power Commission itself, to show in a Section 7 proceeding that the gas to be sold will (a) not eventually be used by consumers in an economically inferior way, (b) not be wasted through an over-supply situation and (c) be needed by the public?

STATEMENT OF THE CASE

The Superior Oil Company, Petitioner in No. 231, was one of 36 consolidated applicants seeking authority under Section 7(c) of the Natural Gas Act to commence deliveries to an interstate pipeline through the issuance of an acceptable permanent certificate of public convenience and necessity from two separate fields located in Texas Railroad Commission District No. 3 (District No. 3). Separate contracts covered the two proposed sales to Florida Gas Transmission.

The earlier sale, FPC Docket No. G-20359, proposed to sell to Florida Gas Transmission gas produced from the Pheasant Field, Matagorda County, under contract dated August 1, 1959, filed as Superior's FPC Gas Rate Schedule No. 99, at a proposed price of 17.5 cents per Mcf at 14.65 psia.[1] An unconditioned temporary certificate was issued to Petitioner authorizing deliveries of natural gas at the contract price of 17.5 cents per Mcf by Commission Order of November 2, 1961.

Superior's second sale, Docket No. CI63-584, covers the proposed sale to Florida Gas from the Oliver Field, Brazoria County, Texas, under a contract dated September 20, 1962, filed as Superior's FPC Gas Rate Schedule No. 109, at a proposed price of 17.5 cents per Mcf at 14.65 psia.[2] A temporary certificate was requested by Petitioner and the Commission offered Petitioner a temporary certificate to deliver gas at a price of 17.5 cents per Mcf conditioned to the further pos-

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[1] III R. 2316. A permanent unconditioned certificate was issued Petitioner by Commission Order dated September 19, 1960. A year later the permanent certificate was rescinded over the protest of Petitioner.

[2] III R. 3078.

sibility of refund down to 16 cents per Mcf refund floor.

Subsequent to the issuance of the unconditioned temporary certificate and conditioned temporary certificate, sales have commenced from both fields to Florida Gas for resale in interstate commerce.

Superior is the only Petitioner who, in the Hawkins proceeding before the Commission and on review before the D. C. Circuit, has claimed the Commission has erred in its determination of the proper initial price at which certificates could issue. In an effort to avoid duplication of facts and procedural development, Petitioner adopts the Statement of the Case contained in the Joint Brief filed in Nos. 60, 111, and 143, with the exception that those Petitioners consider the primary question in the Hawkins record to be the determination of the in-line price for the period subsequent to the issuance of the Statement of General Policy 61-1 on September 28, 1960. Superior submits that the determination of the in-line price issue for the period prior to and subsequent to the issuance of the Statement of General Policy 61-1 on September 28, 1960, are equally deserving of this Court's review.

Docket No. G-20359, the sale proposed between Florida Gas and Superior, under contract of August 1, 1959, was consolidated with other previously consolidated dockets on March 31, 1960 in the Coastal Transmission proceeding, No. G-18338, et al. By separate order of that same date, the Public Service Commission of the State of New York was denied intervention in the Coastal Transmission proceeding. At the time of denial of intervention, Superior was not a party to that proceeding.

On September 19, 1960, after severance from the Coastal Transmission proceeding, a permanent certificate was issued under the abridged procedures. *Ohio Oil Company, et al.*,[3] Docket No. G-17896. The permanent certificate issued Petitioner authorized a 17.5 cent per Mcf initial rate conditioned only "upon an order subsequently granting certificates to" Coastal Transmission Corporation. On August 9, 1961, the Commission issued an order in Docket No. G-18338, et al., Coastal Transmission Corporation, et al., authorizing Coastal Transmission to accept deliveries from Petitioner in Docket No. G-20359. On that same date and in the same order, the Commission rescinded the permanent certificates previously issued to Petitioner and substituted in lieu thereof new permanent certificates conditioning Petitioner to a future determination of the initial price for its sale to Coastal. Petitioner protested the rescinding of the previously issued permanent certificate and the conditions attached to the new proffered conditioned permanent certificate. 26 FPC 318 (1961)

On November 2, 1961, the Commission set aside its August 9, 1961 order and held that pending the determination of the price issue, producers who received permanent certificates under the abridged proceeding in *Ohio Oil Company, et al.*, Docket No. G-17869, et al., would continue to sell gas to Coastal (Florida Gas) "pursuant to the terms of temporary authorizations heretofore issued each such producer without modification pending issuance of permanent certificates."[4]

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[3] Not reported in Federal Power Commission Reports.

[4] 26 FPC 683 (1961).

Said order further stated:

> "Producers who have accepted temporary authorizations and are delivering gas thereunder cannot discontinue their service without compliance with the abandonment requirements of Section 7(b) of the Act, and therefore we should not modify the terms and conditions under which they committed their gas to the interstate market by the addition of price and refund conditions without first affording them an opportunity for hearing."[5]

And still further:

> "We will also tender temporary authorization to the remaining producers herein under Section 157.28 of our Regulations under the Act, permitting them to sell gas to Coastal. In issuing temporary authorizations to these producers, we will permit them to *render service under their rate schedules without any conditions* relating to initial prices where such prices are at or lower than those price levels set forth in our Policy Statement 61-1 as amended."[6] (Emphasis added)

The Policy level at that time was 18.0 cents per Mcf at 14.65 psia and Superior's contract price of 17.5 cents in reliance on said Policy was negotiated at a lesser rate.

Petitioner contended before the Commission that its contract price of 17.5 cents per Mcf was in line for both sales when considered with the line of prices permanently certificated in other sales in District No. 3

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[5] Ibid.

[6] Ibid.

contemporaneous in time and otherwise comparable to Petitioner's interstate sale.[7]

The Commission determined that the in-line price for District No. 3 was 16 cents per Mcf for sales prior to September 28, 1960 and 17 cents per Mcf subsequent to that date. The Commisison determination was based on a record which included only a contract price study of all temporary and permanent certificate sales made in District No. 3 since 1954. Offers of other cost and economic studies to support their contract prices contained in the applications were excluded by the Hearing Examiner and affirmed by the Commission citing *Skelly Oil Company,* Opinion No. 362, 28 FPC 401. Such exclusionary ruling has received this Court's approval in *U.G.I.* v. *Callery Properties Inc.,* 382 U.S. 223, 86 S. Ct. 360 (1965). The Commission relied upon selected permanent certificate price arrays for District No. 3 for the two periods under study, i.e., January 1, 1958 through September 27, 1960 and September 28, 1960 through December 31, 1963, to determine the in-line price. These tables reproduced below, without modification, state an average price weighted by volume for the Pre-Statement period of 15.16 cents per Mcf and the Post-Statement period of 16.17 cents per Mcf.

[7] Commission Opinion No. 321, Trunkline Gas Company, 21 FPC 704, issued 20-cent permanent certificates in Texas District No. 3 only two months prior to Petitioner's contract negotiations with Coastal Transmission (now named Florida Gas Transmission). Such Commission action directly affected the contract negotiation.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFCATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	4.50
13.5	8	116,100	4.35
14.0	3	60,750	2.28
14.2	1	45,000	1.69
14.4	1	90,000	3.38
14.5	4	132,000	4.95
14.6	2	96,000	3.60
15.0	8	295,075	11.07
15.1	1	60,000	2.25
15.2	3	166,170	6.23
16.0	4	968,000	36.31
16.2	4	514,000	19.28
17.5	1	2,190	0.08
18.0	1	731	0.03
	44	2,666,016	100.00

DISTRIBUTION OF PRICES PERMANENTLY CERTIFCATED
(Dated 9-28-60 through 12-31-63)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	2.13
13.0	2	75,000	6.64
13.5	2	33,615	2.98
14.0	2	42,000	3.72
14.5	3	75,000	6.64
15.0	9	213,100	18.88
16.2	3	155,000	13.73
16.5	1	30,000	2.66
18.0	3	481,040	42.62
	27	1,128,755	100.00

Contract prices were not considered in arriving at the average price weighted by volume but rather were found to be useful only to show economic trends in the area.

Temporary certificates, although considered of primary importance in the *Amerada Petroleum Corporation, et al.,* Opinion No. 422 price determination, were not considered in arriving at the average price weighted by volume. 31 FPC 623 (1964).

Nine large volume[8] permanently certificated 20-cent sales no longer subject to Court review which the Commission admitted, if fully considered would have "a strong effect on the weighted average price of 15.16 cents per Mcf" for the Pre-Statement period,[9] were excluded from the price determination.

In addition the Commission affirmed the Examiner's exclusion of six dockets which were permanently certificated at settlement prices ranging from 16 cents to 18 cents[10] per Mcf, pursuant to separate Commission Orders.

Certificates no longer subject to review and final in all respects covering substantial volumes of gas flowing in interstate commerce were excluded.

The Commission, after citing the Texaco Seaboard Opinion No. 383, and *Hassie Hunt,* Opinion No. 412, decisions, by name only and without further rationale or justification for its conclusion, excluded large volume

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[8] III R. 1432-1433. 1,515,650 Mcf estimated for the first month of deliveries.

[9] III R. 7294.

[10] Docket No. G-19559, Cities Service Oil Company, was settled, per Commission Order of December 26, 1962, at 18.0 cents per Mcf. Estimated volumes totaled 300,000 Mcf per month or 3,600,000 Mcf per year. Actual volumes for 1963 totaled 3,586,405 Mcf (Form 301-B on file with the FPC). This one sale alone, excluded by the FPC, constitutes 10% of the limited volumes relied on by the FPC.

17.5 cent permanent certificate sales to Coastal Transmission Company.[11]

The Commission also did not consider evidence of intrastate prices in District No. 3 despite evidence that large volumes moved at 19.5 cents and 21.5 cents and a weighted average for all ten intrastate Pan American Petroleum Corp. sales comparable to the total interstate volumes being considered, was 19.329 cents per Mcf.[12]

The Commission, after such eliminations, found no reason to disturb the previously determined 16-cent in-line price in the *Seaboard* and *Hassie Hunt Trust* cases[13] for the Pre-Statement period. The Commission asserted that consideration was given to sales above the 16-cent price in order to arrive at the 16-cent in-line price. This cannot be true. Even with the questionable elimination of certain high-priced certificates, over 55 per cent[14] of the gas remaining[15] for Commission consideration was at or above the 16-cent price level and 20 per cent was above the 16-cent price level.

For the Post-Statement period, The Commission noted that a number of sales and moderate volumes

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[11] III R. 7298. Estimated volumes total 472,183 Mcf for the first month of deliveries.

[12] III R. 7297; R. 319. 2,666,016 Mcf per month interstate vis-a-vis 2,811,000 Mcf per month intrastate.

[13] *Texaco Seaboard* Opinion 383, 29 FPC 593 (1963), *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438 (1963).

[14] Estimated volumes total 1,484,921 Mcf for first month of deliveries.

[15] Estimated volumes total 2,666,016 Mcf for first month for all deliveries.

moved at the 15-cent, 16.2-cent and 16.5-cent levels.[16] Very large volumes moved at the 18-cent price level.[17] In addition, the Commission stated consideration of unconditioned temporaries and contract prices justified a 17-cent in-line price for the Post-Statement period.

The District of Columbia Circuit Court concurred with the Commission in the elimination of the nine 20-cent high volume permanent prices from any determination in the price line. The Court also concurred in the Commission determination that the 1956-57 Coastal sales, although permanent and no longer subject to judicial review, should not be considered in the price line determination. The Court of Appeals sustained the Commission's determination of the 16-cent in-line price in District No. 3 for the pre-policy period. However, it reversed the Commission for considering contract prices or temporary certificate prices and held the consideration of the in-line price must be limited to permanent certificates for the Post-Statement period. The Court held that the Commission's Statement of General Policy guideline price levels should be given no weight whatsoever in determining the in-line price.

> "It is true that our decision may cause the in-line price to be frozen temporarily during this interim period between sales of gas and the rate determination under Section 4 or 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing."[18]

The Commission was obligated, the Court held, to consider whether a public need existed for this gas be-

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[16] III R. 7295. 398,100 Mcf estimated for first month of deliveries.

[17] III R. 7295. 481,040 Mcf estimated for first month of deliveries.

[18] IV R. 4314.

fore it grants a permanent certificate to a producer and that the fact that Petitioner's gas was then moving in interstate commerce, and had been so moving since 1961, was not sufficient evidence that there was a present and future need for it. If the end use of such sale, as determined by the Commission, will be economically inferior, the Court held the sale should not be certificated.

The District of Columbia Circuit decision below is in conflict with the Tenth Circuit review of the *Amerada* proceeding, Opinion No. 422.[19] This Court granted certiorari on all questions presented by Petitioners in the consolidated certificate cases.[20]

SUMMARY OF ARGUMENT

During the last ten years, distribution companies and state commissions have selectively intervened in all Section 7 certificate proceedings wherein applicants have sought permanent certification above the 15-cent level in Texas Railroad District No. 3. The Commission has considered such proposed sales as suspect and therefore unreliable for purposes of determining the weighted average price for this area. These acts of intervention, coupled with misuse of the suspect price doctrine has frozen the price line or has even rolled it back to 1956 levels. The requirement in CATCO of price line currency is frustrated.

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[19] IV R. 4314. *Sunray DX Oil Co.* v. *F.P.C.*, 320 F. 2d 181 (10 CCA 1966).

[20] FPC and PSC, by separate memorandum, opposed the grant of certiorari to Petitioner's questions 2 and 3 wherein the price line methodology was challenged. Certiorari was granted to all Petitioners' questions, including 2 and 3, on October 9, 1967, No. 231.

This Court in *Callery* approved the Commission in-line concept intended to meet the CATCO requirement to hold the line pending the determination of the just and reasonable rate for this area. *Callery* held that the proper and only evidence necessary to establish a relevant price line was a field price study containing contemporaneous permanent and temporary certificates.

The Commission and the Court of Appeals have misapplied the principles of *Callery* in setting erroneous and unduly low price lines for the period prior to and subsequent to September 28, 1960. The Commission findings adopted from earlier proceedings to which Petitioner was not a party are unsupported by this record. Commission rulings giving no weight whatsoever to the large volume non-suspect permanently certificated sales, no longer subject to judicial review, result in an erroneous weighted average price. Nine 20-cent permanent certificates and six permanent certificates settled at or above the proposed line approximating the volumes considered by the Commission, were totally disregarded. Those prices, however, are not suspect. Those prices also were not alleged to be erroneously issued. They reflect prior well-considered Commission action and must be taken as correct. They should not be discounted or subjected to collateral attack by the Commission. Once the Commission has selected their method of in-line pricing by a review of non-suspect field price data only to determine all aspects of present and future public convenience and necessity, it does not have discretion to pick and choose among permanently certificated non-suspect prices not subject to review to find the price line. The Commission application in Texas Railroad District No. 3 of the

in-line method approved in *Callery* is based on prejudicial legal error and must be reconsidered.

The Commission should consider questions of public need of gas in pipeline certificate proceedings and not in producer certificate proceedings. Further, if such a determination of need is allowed in the producer certificate proceeding, the movement of gas in interstate commerce since 1961 and the resulting consumption is alone sufficient evidence of the pipeline's need for the gas.

ARGUMENT

I. THE EFFECT OF THE DECISION BELOW IS TO "FREEZE" THE PRICE LINE AFTER IT HAS ONCE BEEN DETERMINED BY THE COMMISSION, OR TO "ROLL IT BACK" TO THE PRICE LINE EXISTING IN AN EARLIER PERIOD.

Petitioner, in an effort to avoid duplication of argument, adopts Section I of the Joint Petitioner-Producers' Brief showing that the cumulative effect of (1) the action of the intervenors opposing by intervention and certification at a 15-cent price level or above, and (2) the exclusion of such proposed certificate prices from evidence in certificate proceedings under Section 7 because of such opposition alone creates a freeze in the price line once determined by the Commission, or perhaps a "rollback" to a line of prices existing at earlier periods.

II. NEITHER THIS COURT'S DECISIONS IN CATCO AND CALLERY NOR THE CIRCUIT COURT DECISIONS INTERPRETING THEM, REQUIRE A "PRICE FREEZE" UNTIL THE DETERMINATION OF A JUST AND REASONABLE RATE UNDER SECTION 4 AND 5.

Further, Petitioner hereby adopts Section II of the Joint Petitioner-Producers' Brief wherein it is argued that a price line freeze is not required by this Court's CATCO and *Callery* decisions and that a price line

freeze is contrary to public interest. Petitioner, however, does not adopt but denies the statement of the Joint Petitioner-Producers' Brief in the last paragraph of Section II-A to the effect that the Commission's decisions are based on substantial evidence. The elimination of numerous sales and most of the volumes of gas moving in interstate commerce contemporaneous with the sales at issue shows on the whole record that there is, in fact, no substantial evidence to support the Commission's findings.

III. THE COMMISSION ERRED IN ITS APPLICATION OF IN-LINE PRICING TECHNIQUES TO DETERMINE THE PROPER INITIAL PRICES.

Petitioner asserts that the Commission determination of the price line for the periods prior and subsequent to September 28, 1960 were erroneously low and the Court below erred in affirming such prices. The record shows, even after the eliminations of suspect sales, that findings of a higher price for both periods are required. The proper consideration of: non-suspect permanent certificates; actual rather than estimated sales volumes where available; the issuance of conditioned and unconditioned temporary certificates; the intrastate price data and trends; and the elimination of non-comparable low volume sales at or below a 14-cent price, individual or in combination, justify higher in-line price determinations for both periods.

Petitioner accepts this Court's CATCO decision[21] which recognized broad powers to review and condition Section 7 certificate applications and the concept of interim in-line pricing pending the determination of just and reasonable applicable rates.

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[21] 360 U.S. 378, 79 S. Ct. 1246 (1959).

Petitioner also recognizes the Commission's power to condition temporary certificates, *F.P.C.* v. *H.L. Hunt,* 376 U.S. 515 (1964), and the effect of this Court's decision in *U.G.I., et al.,* v. *Callery Properties, Inc.,*[22] that the Commission has discretion to determine all aspects of present and future public convenience and necessity on the single inquiry of whether the price proposed is in line with existing prices, and if not, to condition to a level no higher than the existing level of prices in the area under review. We deny that when considering a certificate application solely on in-line evidence, the Commission has further discretion to pick and choose among permanently certificated prices, not subject to review, those which it will use to create a price line or refuse to consider. The entirety of the concept is an artificial one.[23]

The in-line price method approved by the Supreme Court in the *Callery* case for the South Louisiana area, both recognizes and restricts Commission discretion in a certificate proceeding. When cost and economic evidence offered by Petitioner to show why a proposed price is justified, even though it may be out of line, may be properly excluded, the only remaining evidence to be reviewed is restricted to that relating to field price data, all of such field data must be considered unless immaterial, irrelevant or excludable as suspect. When the Commission's discretion to enter on such a restricted hearing is exercised and approved by this Court, it thereafter has no discretion to pick and choose from the relevant and material evidence adduced for

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[22] 382 U.S. 223, 86 S. Ct. 360 (1965).

[23] *P.S.C.* v. *F.P.C.,* 373 F. 2d 816 (CADC 1967). Joint Appendix III R. 4304.

its determination of the price line without explanation or justifiable legal reason set forth in its decision.

Courts ought not to have to speculate as to basis for an administrative agency's conclusion. Conclusions must be rationally supported by findings and show the basis of all issues of fact, law and discretion. *Northeast Airlines* v. *C.A.B.*, 331 F. 2d 579 (1CCA 1964). The Commission or any agency must make findings that support decisions and such findings must be supported by substantial evidence in the record. Mr. Justice White speaking for this Court in *Burlington Trunkline Inc.* v. *U.S.*, 371 U.S. 156, 83 S. Ct. 279 (1962), stated:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it. . . . The agency must make findings that support its decision and those findings must be supported by substantial evidence." At page 167.
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> "The courts may not accept Counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."[24]

Moreover, determination of the "substantialness" of the evidence must be reflected by the whole record and not improper selections of record evidence without

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[24] 371 U.S. at pages 168-169 referring to *S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577.

stating adequate reasons for its findings and conclusions.[25]

A. Callery Does Not Foreclose This Court's Price Line Review

The in-line price for District No. 3 has never, prior to the Court's review below, been affirmed on or subjected to judicial review. *Callery,* in affirming the in-line price found for South Louisiana after elimination of suspect prices affirmed the general doctrine of suspect price exclusion. The principle of that case is, of course, applicable to our proceeding but different records, procedural histories, and factual situations exist. *Callery* did not inquire into any specific application of the suspect doctrine and because of its procedural posture before this Court should be limited to the particular circumstances there involved. The circuit court reviewing the in-line pricing technique of the Commission in the South Louisiana case rejected the entire finding for failure to consider aspects of present and future public convenience and necessity other than price line data. The issue of the mechanical inputs and exclusions of prices upon which to base a "price line" as employed by the Commission was never reached. 335 F. 2d 1004. On certiorari, the Commission's in-line price determination was affirmed by this Court without any discussion of the particular application of the exclusions justified as suspect. The producer respondents there involved did not brief that issue as they took the position such issue, not being in the questions presented in the Petition for Certiorari, was not before the Court for determination. Mr. Justice Harlan, in a separate concurring opinion, stated:

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[25] *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490; 71 S. Ct. 456. Also *U.S.* v. *Carlo Bianchi and Co.,* 373 U.S. 709, 715, 83 S. Ct. 1409; *Mississippi River Fuel Corp. v. F.P.C.,* 163 F. 2d 433 (CADC 1947).

"In locating the in-line price, the Commission has ignored a number of contemporaneous high-priced contracts labelled suspect because then under review, disapproved, or deemed influenced by those under review or disapproved. Although the danger of using a crooked measuring rod demands some precaution this blanket exclusion also chances some distortion in favor of an unduly low in-line price. In the main, producers have chosen not to brief this question, apparently on the misapprehension that the government has not here sought to sustain the exclusion of these contracts or that the lower Court's failure to reach the question precluded this Court from doing so. *But while the suspect order rule may by default be abided in this instance, I would not close the door to future arguments for a different solution of the dilemma.*" [26] (Emphasis added)

It is this "crooked measuring rod" which we now assert was erroneously employed in the Commission's instant in-line price determination which we feel the Court should find erroneous. The Commission has, by legal error, under the guise of inclusions and exclusions justified under the suspect doctrine improperly, here determined the applicable in-line price for District No. 3.

B. The Suspect Price Doctrine

The first court to interpret this Court's CATCO case was the Ninth Circuit's *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9CCA 1960). The court there stated that the line referred to in CATCO should refer to relevant and existing producer prices which were current and "under which substantial amounts of natural gas move in interstate commerce." The Court went on to alert the

[26] 382 U.S. 223, 86 S. Ct. 360 (1965) at page 228.

Commission that in-line concept did not allow a roll-back to prices. It held:

> "The price line is intended to reflect current conditions in the industry and not conditions in the years preceding the subject contracts . . . Contracts should be comparable from the standpoint of gas reserves and future potentials." At page 824.

The Ninth Circuit then qualified the evidentiary basis for price line determination by pointing out that prices then before the Commission, or the courts for review, because of the possibility of change on review were not to be considered and that "a substantial number of certificated prices under court review, like prices in the same area though not currently under review ought to be regarded as suspect" because of the same possibility, unless it could be shown that such possibility of change in price was not present, i.e.,

> "such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the present proceedings." At page 824.

It did not hold nor has the suspect price doctrine ever stood for the proposition that a permanent certificate, final and no longer subject to review, is in any respect not relevant to or suspect in an in-line determination. These prices, otherwise material, are the prices the Ninth Circuit required be considered to determine an in-line price.

C. The Commission Retreat From Callery

This Court in *Callery,* applying the in-line principles of CATCO as implemented by the *U.G.I.* Ninth Circuit decision, affirmed the Commission contention that

the in-line price level should be the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous non-suspect certificates. Only the basic methodology asserted by the Commission in *Callery* was approved by this Court.

> "We believe the Commission can properly conclude under Section 7 that adequate protection to the public interest requires as an interim measure that *gas not enter the interstate market at prices higher than existing levels.*" [27] (Emphasis added)

The Commission, in this instant case, by the use of a crooked measuring rod to determine and exclude so-called suspect prices, has failed to fix a "line" supportable by the evidence, at either the highest level of existing prices or at the weighted average level of permanent final certificate prices. The Commission has erred, as did the Court below, to the extent it affirmed the Commission. Necessarily the Court below even more grievously erred in finding the Post-Statement price was not more than adequately supported by substantial record evidence.

D. The Current Conditions Requirement Can Only Be Met by Considering Temporary Prices

The in-line concept of CATCO requires the Commission to determine price lines that reflect current conditions in the industry. A price freeze was neither intended nor permitted. Current conditions are to be reflected. Erroneously, the court below held that CATCO logically required not only a freeze of the price line but complete disregard for current conditions.[28]

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[27] 382 U.S. 223, 228.

[28] IV R. 4314.

The Fifth, Ninth, Tenth, and even the D. C. Circuit in an earlier case[29] approved the concept of a price line being changed if the facts and findings of record evidence so required.

Callery said the proper and only evidence necessary to establish a price line and allow a proper evaluation of all factors bearing on the public convenience and necessity was the field price study, including temporary and permanent certificates.[30] The Statement of General Policy 61-1, issued by the Commission September 28, 1960, as amended, sets the guideline price levels. It has directly affected producer-pipeline interstate contract price negotiations, as well as determined Commission policy in fixing price conditions attached to temporary or permanent certificates. In 2nd Phillips[31] this Court acknowledged the significant role of the Statement of General Policy in arresting upward producer prices and in issuing considered conditioned certificates.

If the many Commission and court statements requiring certificates to reflect current conditions in the industry are to have any substance and meaning, then the Commission, of necessity, is required to rely on field price evidence directly attributable to and induced by its Policy Statement to determine a current price line. The consideration of prices induced, if not required by the Commission's Policy Statement, as shown

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[29] *Continental Oil Company* v. *F.P.C.*, 378 F. 2d 510 (5 CCA 1967); *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960); *Sohio Petroleum Co.* v. *F.P.C.*, 298 F. 2d 465 (10 CCA 1961); *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677 (CADC 1963).

[30] *U.G.I.* v. *Callery Properties, supra,* at page 227.

[31] *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 83 S. Ct. 1266 (2nd Phillips 1963).

by only temporary certificates contemporaneous with the sales of Superior in 1959 and 1962, an in-line price of 18.05 cents for the 1958-1963 period.[32]

E. Erroneous Determination of Suspect Prices and Their Exclusion From Consideration of the In-Line Determination Results in an Erroneous Line Determination

Under an erroneous concept of the suspect price doctrine the following comparable prices were excluded before mathematically computing the weighted average price, the basis for the in-line price determination.

(1) *The 20-cent Trunkline Permanent Certificates.* The elimination from the price line determination of the nine 20-cent sales to Trunkline Gas Company, permanently certificated and no longer subject to court review, resulted in a price line determination which is admittedly erroneously low if such should be considered.

> "Arithmetically, the large volumes of 20 cents would have a strong effect on the weighted average of 15.16 cents per Mcf, but these should be discounted as was done in Texaco Seaboard, where six of the nine sales were involved in the Trunkline Gas Company, et al., 21 FPC 704 (1959) with respect to which New York's petition for review was dismissed because not timely. *PSC* v. *FPC*, 284 F. 2d 200 (CADC 1960). Concerning these sales and those in other categories above 16 cents, the Commission stated in Texaco Seaboard:
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> > " 'it is thus apparent that the prices at the 17.5 cent level and above must all be discounted since they either have subsequently been set aside (and are presently before us for new decision) *or would have been set aside,* for failure to permit a proper party to intervene, save for the proce-

[32] IV R. 7296.

> dural defect in the PSC review action in the Trunkline case'." (Emphasis added) (Footnotes omitted)[33]

The Opinion of the District of Columbia Circuit Court on review stated:

> "In this case, over Superior's objection the Commission refused to give full weight to certain 20-cent sales. According to the FPC these and similar sales should be discounted because 'they either have been subsequently set aside . . . or would have been set aside . . . save for the procedural defect in the PSC review action.' This reason is adequate, and we do not think the Commission abused its discretion by not giving full weight to the 20-cent sales."

While the word "discount" was used, its effect was also stated "to which in any case we give little weight." Both expressions were understatements. Any weight would have required a different result, and they were entitled to full weight.

Petitioner submits that the disregard by the Commission as affirmed by the Court below of the 20-cent Trunkline sales with their underlying large volumes[34] is legal error resulting from a misunderstanding of the Ninth Circuit UGI suspect price doctrine. We believe there is no doubt that the 20-cent sales are comparable, current and admittedly to be fully considered if non-suspect. The Commission has no discretion to ignore or disregard or substantially discount such sales in the application of this artificial concept. Legal error rather than an abuse of discretion is involved.

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[33] III R. 7296.

[34] 1,515,650 Mcf estimated first month volumes constituting 60 per cent of those permanent certificates volumes reviewed.

The D.C. Circuit accepted the Commission argument that since six of the nine 20-cent sales in 1960 were subject to judicial review (the situation and time at which the Ninth Circuit spoke in *U.G.I.* describing such sales as not relevant) such sales would never thereafter be relevant in an in-line price determination even though the 1960 judicial review resulted in legal affirmance of these 20-cent sales. The review was dismissed, *P.S.C. of N.Y.* v. *F.P.C.*, 284 F. 2d 200 (CADC 1960). Such an argument and holding is not sustainable. When judicial review is exhausted and the price is unchanged, it is at least as relevant as prices which become final as a result of no party seeking rehearing or judicial review.

The Commission also urged to the Court below that this Court in *Callery*[35] had previously rejected Superior's contention that the termination of judicial review in six of these same 20-cent sales removed the factor which had made them not relevant in 1960 in that *Callery* had affirmed the Commission Order declaring those six sales permanently suspect. The Commission contention is misleading.[36] The question of

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[35] *U.G.I.* v. *Callery Properties Inc.*, et al., *supra.*

[36] The Commission, indeed, did hold that all certificated prices in excess of 18½ cents per Mcf (exclusive of tax reimbursement) in South Louisiana were suspect and to be excluded from consideration in fixing a South Louisiana price line. When, however, the matter reached this Court, the questions presented upon which certiorari was granted were:

> "1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand,

specific application of the suspect price doctrine was not raised nor considered. The Commission brief in *Callery* called all prices in excess of the CATCO price

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profit and market price trends, cost-revenue trends, comparative well costs, etc.) other than that relating to the determination of a price at which the gas can enter the interstate market without disrupting the level of prices in that market?

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's refraining from filing any rate increases above a specified level, fixed to avoid triggering escalations of other prices, during the pendency of the area rate proceeding, but not after July 1, 1967?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an in-line initial price, require that the applicant refund all charges in excess of that price that were previously collected under an earlier unconditioned certificate which had been invalidated on court review?"

Page 3 of Brief for FPC in Nos. 21, 22, 26 and 32, October Term 1965, *U.G.I.* v. *Callery Properties, et al.*

FPC by a footnote stated on the last page of its Application for Writ that if the Petition were granted, it would "set forth our reasons for believing that the Commission's method was proper and no remand on this point is necessary." Footnote 14, page 15 of Application for Writ.

Respondents, feeling that this was not sufficient to permit consideration by the Court of the correctness vel non of the in-line price, did not brief the issue, but requested the right to file a supplemental brief thereon if the question was to be considered. Thus, when the Court considered the *Callery* case, it affirmed the Commission price line finding determined from remaining certificate prices after exclusion of Commission self-declared suspect prices. A South Louisiana price was declared suspect if "at prices equal to or higher than the CATCO level." Further, the Commission asserted that "the evidence was uncontradicted, the specific findings undisputed, and the only question is whether the Commission acted improperly in fixing the in-line price at the highest level after eliminating from its consideration the unsupported CATCO prices and similar prices obviously influenced by the Commission's earlier erroneous certification of the CATCO contracts." Page 31 of the Commission Brief in No. 21, October Term, 1965, *U.G.I.* v. *Callery Properties.* Of course, CATCO prices in South Louisiana are not relevant in Texas Railroad District No. 3.

suspect because they were higher[37] than the prices found out of line in CATCO, not because they were subject to review. Of course, the CATCO price level is not applicable here. No decision of this Court has found a Texas Railroad District No. 3 sale in or out of line. Mr. Justice Harlan's comment quoted above shows the "default" nature of *Callery* as to the South Louisiana price line determination. The future argument referred to by Mr. Justice Harlan is now presented by Petitioner. Clearly, this Court's *Callery* decision, accepting the in-line price determination in South Louisiana, is not binding on the Texas District No. 3 price line determination.

In *U.G.I.* v. *F.P.C.* decision,[38] Judge Hamley, speaking for the Ninth Circuit, addressed himself to a contention by U.G.I., a distributor petitioner, that prices in proceedings to which it or the Public Service Commission of the State of New York were denied the right to participate should not be considered in determining a price line.

> "The objection [to the prices in proceedings where PSC or UGI were denied the right to intervene] is not abstract . . . UGI asserts that the 16 schedules were certified in four proceedings in which UGI and NY were denied the right to participate." At page 824.

The Ninth Circuit made clear that the Commission, in determining the price line, should not consider

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[37] Commission Brief in Callery, October Term, Nos. 21, 22, 26 and 32, *U.G.I.* v. *Callery Properties, supra.*

[38] 283 F. 2d 817 (9 CCA 1960).

sales with prices subject to court or Commission review. Nor should they consider like prices which were not then subject to review unless it be shown they do not have the same infirmities. They were also suspect. The court's stated reason was that in the event the existing rate subject to review is later modified or conditioned as a result of the pending proceedings, the foundation of the line derived therefrom would be undermined and "like prices" might equally be reduced.

> "The acceptance of a questioned existing price as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged." At page 824.

When the relevant prices in pending proceedings on review were finally left unchanged, and "like prices" were found not to be "infirm" these prices are no longer suspect. The anomalous effect was no longer possible. The Ninth Circuit concurs.

> "Where such a denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring to the initial price therein certified in the process of fixing a line in a subsequent proceeding. This is true, because *if not judicially challenged a Commission order excluding participation by others must be taken as correct.* (Emphasis added) At page 825.

In no way does it suggest that the price remains suspect[39] forever.

The computation of the price line for the Pre-Statement period reproduced in Opinion No. 475[40] reflects the total elimination of the Trunkline sales which were permanently certificated and not subject to any further Commission or court review. No evidence has been shown by the Commission, Staff or distributors that they were subject to the same infirmity or were similar to sales then under Commission or court review in 1965 when the price line determination was made in District No. 3. And yet, the Commission in their Opinion, improperly cites the Ninth Circuit case as support for their exclusion of not only the six Trunkline sales involved in the Ninth Circuit litigation but the three additional Trunkline sales at the same 20-cent level which were never subject to judicial review. That court held clearly to the contrary.

> "As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount

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[39] The term "suspect" discussed by Commission in the *Texaco Seaboard* Opinion has far less permanent impact. Prices even at the time of pending judicial review could be considered.

> "In connection with our determination we may further observe that in our opinion the suspect price doctrine was not intended as a rigid exclusionary rule. If it were, comparatively low prices at fair and readily defensible levels might be made subject to litigation at the will of some intervening party and our authority to determine proper initial prices under the Natural Gas Act thus limited for reasons that are unrelated to the public interest." 29 FPC 593 at page 598 (1963).

[40] III R. 7294.

> of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could in fact require a rollback to prices having no current relevancy." At page 824.

The Trunkline sales due to the pending petition for review of PSC's denial of intervention before the District of Columbia Circuit may have at one time been temporarily suspect in 1960. As such, they were then under a cloud for purposes of determining a price line. However, that review was unsuccessful and comparable permanent certificates at 20-cent prices are now final. The Trunkline 20-cent sales in Texas Railroad District No. 3 are unimpeached and unimpeachable as valid legal orders of the Commission and immune from collateral attack. A collateral attack upon a Commission order is not permitted. *Calanan Road Improvement Company* v. *U.S.*, 345 U.S. 507, 512, 73 S. Ct. 803, 806, 1953. *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9CCA 1965). Such prices must be fully considered and equally weighed in determining the price line. The prices certificated therein as a matter of law must be taken as correct in subsequent proceedings. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817, 825 (9CCA 1960). *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9CCA 1965).

The previously shown certificate array used by the Commission for the Pre-Statement period, if modified only by the addition of 20-cent price contracts permanently certificated and previously eliminated by the Commission, illustrates the effect of including and excluding such 20-cent sales.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFICATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume (1) without 20¢ sales	Percent of Total Volume (2) with 20¢ sales
Less than 10.0	3	120,000	4.50	2.87
13.5	8	116,100	4.35	2.78
14.0	3	60,750	2.28	1.45
14.2	1	45,000	1.69	1.07
14.4	1	90,000	3.38	2.16
14.5	4	132,000	4.95	3.15
14.6	2	96,000	3.60	2.30
15.0	8	295,075	11.07	7.05
15.1	1	60,000	2.25	1.44
15.2	3	166,170	6.23	3.97
16.0	4	968,000	36.31	23.15
16.2	4	514,000	19.28	12.29
17.5	1	2,190	0.08	0.05
18.0	1	731	0.03	0.02
	44	2,666,016		63.75
20.0	9	1,515,650	....	36.25
	53	4,181,666	100.00	100.00

Volumes under the 20-cent price constitute 36.25 per cent of all volumes permanently certificated and no longer subject to court review. Under the highest level of prices not suspect,[41] the in-line price for this period must be 20 cents per Mcf. The weighted average price for all sales is 16.9 cents per Mcf. Following the recent technique of the Commission,[42] the selection of

[41] The method advocated by the Commission to this Court and approved in the *Callery* opinion.

[42] *Amerada*, Opinion 422, 31 FPCA 623; *Hassie Hunt*, Opinion 412, 30 FPC 1438; *Hawkins*, Opinion 475, 34 FPC 897; *Sinclair*, Opinion 476, 34 FPC 930; and *Turnbull and Zoch*, Opinion 478, 34 FPC 1001.

a price line must fall somewhere between the weighted average price of 16.9 cents and 20 cents, the highest level of existing prices. This alone highlights the *total disregard* (not discount or little weight given) of the 20-cent sales and volumes. Without them more than 55 per cent of the volumes of gas deemed proper for in-line price purposes was at rates of 16 cents or more. The finding of the Commission, due to Commission legal error in determining the components on which to base the price line, must be corrected and a new in-line price determination, including the impact[43] of the nine 20-cent permanently certificated sales to Trunkline under which more than one-third of the gas flows, must be included. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9CCA 1960).

(2) *The Denial of a Fair Hearing.* The Commission reliance in Opinion No. 475 below, justifying the exclusion of the 20-cent Trunkline sales, makes reference to Opinion No. 383, *Texaco Seaboard, et al.*, 29 FPC 593, where such sales were first characterized as being suspect. Petitioner was not a party to the *Texaco Seaboard* Opinion. Factual conclusions in that case necessarily based on the record made in that proceeding is not controlling or relevant to any factual conclusions or findings that the Examiner and the Commission may have made on the record below. Each separate Commission proceeding must stand upon its own record, regardless of the facts found or shown

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[43] These Trunkline sales were issued by the Commission on May 22, 1959. These sales are made today to Trunkline at 20 cents per Mcf under permanent certification. Petitioner's sale to Florida Gas results from a contract executed on August 1, 1959. The impact of these certificate sales, now final, at the time of the 1959 contract negotiation had controlling effect upon Petitioner's price negotiation.

in other proceedings. *U.S.* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 66 S. Ct. 687, p. 528 (1946). The Administrative Procedure Act, 5 U.S.C. 100(c), requires an agency to make findings based on evidence in the record before it and not other proceedings. The Commission here did not do so but merely looked to see if this record contained evidence to change the findings of the *Texaco Seaboard* Opinion No. 383 and *Hassie Hunt* and *Texaco Seaboard* are substituted in findings of other proceedings to which Petitioner is not a party, the standard of proof of the public convenience and necessity is removed and the findings of Hassie Hunt and Texaco Seaboard are substituted in lieu thereof. The field price studies used to determine the weighted average price in each case are not similar in the slightest and yet the findings are considered conclusive. Petitioner has been denied a fair hearing guaranteed by the Fifth Amendment to the Constitution and the Administrative Procedure Act.

(3) *The 17.5 cent Permanently Certificated Coastal Sales.* There exists a number of permanent certificates at 17.5 cents in District No. 3 reflecting sales to Coastal Transmission Corporation under contracts in the years 1955 and 1956.[44] The Commission justification for exclusion of these sales[45] for the price line adopts the

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[44] Houston Texas Gas and Oil Corp. 16 FPC 118, 141-142, 17 FPC 303, 310.

[45] III R. 1425, 1427-1428. Estimated volumes total 1,196,206 Mcf for the first month of deliveries. Petitioner does not assert that such sales are contemporaneous for a price line determination for Petitioner's 1959 and 1962 sales but rather here highlights the Commission's consistent erroneous interpretation of the suspect price doctrine. Petitioner's sales were also to Coastal and at the same 17.5 cent per Mcf contract price.

reasons stated in the *Texaco Seaboard* Opinion No. 383 and *Hassie Hunt Trust* Opinion No. 412 cases wherein no effect was given to these Coastal sales. The reasons stated in Opinion No. 383 for their exclusion in the price line determination were (1) that Coastal was then a new pipeline company that had neither a certificate nor was yet in operation and therefore such sales may have taken place at higher prices than would have occurred under contracts with an established pipeline due to the additional risk factor; (2) that [redacted] 17 cents and above at the time of *Hassie Hunt* and *Texaco Seaboard* (1962-63) were in litigation and were therefore suspect; and (3) that they were issued prior to the Supreme Court CATCO decision. It is therefore not clear on which of these grounds the Commission excluded these sales below. If it excluded these sales because of their being suspect due to being in litigation at the time of the *Texaco Seaboard* Opinion No. 383, then such exclusion is in error for the same reasons stated in the discussion above in the 20-cent Trunkline sales. Such 17.5 cent permanent certificates are no longer subject to judicial review and are no longer suspect. If the reasons for their refusal to include such 17.5-cent permanent certificate prices is that such sales took place prior to CATCO, then such exclusion contradicts the Ninth Circuit *State of California* v. *F.P.C.* case, 353 F. 2d 16 (9CCA 1965) where pre-CATCO certificates should be considered if otherwise comparable. If the reason for the reliance was the non-comparability of Coastal Transmission Corporation sales with the contracts executed between producers and established pipelines, then Petitioner submits such rationale is totally absent in the Commission opinion and is contrary to *Burlington Trunkline* v. *U.S.* Supreme Court decision, 371 U.S.

156 (1962) wherein Mr. Justice White stated that "a court in order to determine whether or not an agency has exercised its discretion within the bounds expressed by the standard of public convenience and necessity, that "agency must 'disclose the basis of its order.' . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence."[46] This Court, as well as the Court of Appeals for the District of Columbia Circuit, should not be required to speculate as to the basis of the administrative agency's conclusions. The skimpy handling of the Coastal sales by the Commission in Opinion No. 475 below required all to so speculate.

(4) *Permanent Certificates Resulting from Settlement Were Excluded.* The elimination of prices certificated in settlement orders from the price line determination was erroneous. The Examiner's decision shows that settlement orders were not used in the derivation of the price line.[47] The only reason given for such exclusion was the fact that they reflect settlement rates[48] and are not appropriate for in-line price

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[46] 371 U.S. at 167.

[47] III R. 6785 and R. 6788.

[48] The excluded dockets:

1. Tidewater Oil Company, Docket No. G-17578, a 17½ cent contract settled per Commission Order of June 15, 1962 at the then existing guideline rate of 16 cents.

2. Tidewater Oil Company, Docket No. 18376, a 17.5-cent contract price settled per Commission Order of June 15, 1962 at the then guideline price of 16 cents per Mcf.

3. Shell Oil Company, Docket No. G-19571, a 20-cent contract certificated at 17.0 cents per Mcf per Commission Order of August 1, 1962 at the guideline rate.

determination. The questionability of this review is raised by an Examiner's opinion in *Union Texas Petroleum* Opinion 436, 32 FPC 254 (1964) now pending before this Court on a Petition for Writ of Certiorari No. 516 October Term 1967.

> "Citing the conventional reason for disregarding settlements in arriving at a judgment ('settlements may be a simple desire to end protracted litigation'), Staff and Continental conclude that 'no consideration should be given to settlements in determining' the price line at issue herein.
>
> "This reasoning is fully applicable to private litigation but is of doubtful validity when applied to Commission determinations of the public interest. Decisions as to the correct price line for gas sales is, of course, entirely a matter of public interest, as repeatedly stressed in the court decisions *supra*." 32 FPC 305.

Regardless of the parties reasons for desiring settlement, the Commission's obligation under the Natural Gas Act is unchanged. It may not, for its convenience or otherwise, issue orders which are not in the public interest. It cannot properly approve prices which are contrary to public interest. Settlement orders spe-

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4. Gulf Oil Corporation, Docket No. G-20383, a 20-cent contract certificated a settlement rate of 16 cents per Mcf by Commission Order of April 25, 1963 at the in-line rate established in Texaco Seaboard Opinion No. 383.

5. Gulf Oil Corporation, Docket No. CI 60-412, a 17½ cent contract rate certificate at a settlement rate of 16 cents per Mcf by Commission Order of April 25, 1963 at the in-line price determined in the Texaco Seaboard Opinion No. 383.

6. Cities Service Oil Company, Docket No. G-19559, a 1959 contract certificated at 18-cent settlement rate per Commission Order of December 26, 1962 at the guideline rate.

cifically find the settlement prices to be required by the public interest. They are permanent certificate orders, in all respects final and beyond review. They are not even claimed to be suspect or erroneous. Settlement prices represent, therefore, current conditions in the industry. Consistent Commission policy towards the settlement of any case has been at the applicable area price ceiling for initial sales then stated in the Statement of General Policy 61-1, as amended, where the contract rate proposed is higher than said ceiling rates. In addition, then, they reflect the considered judgment not only of the Commission and the producer but also the distributor-intervenors and state commissions who have actively participated, as to what is believed to be the in-line price at the time of settlement. Further, such volumes[49] whether at the 18-cent, 17-cent or 16-cent settlement rates cited above, justify an increased weighted average price. The effect of including the 20-cent Trunkline sales and the settlement dockets in the permanent certificate Commission array results in a weighted average price in excess of 17 cents per Mcf and higher in-line prices for both periods.

The settlement prices represent the minimum in-line price. The failure of the Examiner and the Commission to include such prices in the in-line price determination with their respective volumes, constitutes legal error on the part of the Commission.

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[49] Estimated volumes total 472,183 Mcf for the first month of deliveries.

F. Commission Use of Estimated Volumes When Actual Volumes Were Available

The Commission's refusal to use actual volumes where available in lieu of inaccurate estimated volumes in in-line price determinations constitutes error.

The Commission acknowledged that the use of actual volumes for the Pre-Statement period tends to increase the percentage of the 20-cent Trunkline permanent certificate sales.[50]

The Commission's justification for the use of estimated monthly billings rather than the actual volumes sold and flowing in interstate commerce is that in their opinion the monthly estimates "are an appropriate method by which to determine the relative importance of the gas sold in each price category." Monthly averages of actual volumes are available in the Commission files for each and every year up to and including the year 1962. At the time of the proceedings before the Commission, only isolated volumes were not known for the year 1962 and rather anomalously even more actual volumes were known for the year 1963. The complete actual volumes were known for all of the years 1955-1961, and are now on file at the Federal Power Commission. Study of the actual volume data reveals that the estimates made are inaccurate. The volume of higher prices was generally underestimated. The volume for the lower prices was generally overestimated. The Table tabulated below is the identical certificate array table used by the Commission,[51] to which columns showing 1962 actual volumes and percentages derived from Exhibit 10, Schedule 1, and the 20-cent Trunkline sales have been added.

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[50] III R. 7296.
[51] III R. 7294.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFICATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volume (Mcf)	Percent of Total Volume	Monthly Average of 1962 Actual Volume (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	2.87	120,000*	3.01
13.5	8	116,100	2.78	116,100*	2.92
14.0	3	60,750	1.45	26,422	0.67
14.2	1	45,000	1.07	148	0.00
14.4	1	90,000	2.16	48,675	1.23
14.5	4	132,000	3.15	148,514	3.73
14.6	2	96,000	2.30	62,126	1.56
15.0	8	295,075	7.05	102,404	2.58
15.1	1	60,000	1.44	28,808	0.70
15.2	3	166,170	3.97	282,946	7.12
16.0	4	968,000	23.15	920,362**	23.15
16.2	4	514,000	12.29	151,580	3.82
17.5	1	2,190	0.05	1,639	0.04
18.0	1	731	0.02	2,767	0.07
20.0	9	1,515,650	36.25	1,962,306	49.37
	53	4,181,666	100.00	3,974,797	100.00

* Estimated volumes.

** 3 sales actual 672,362 Mcf
1 sale estimate 248,000
920,362

49.37 per cent of all gas is thus shown to be flowing in interstate commerce at 20-cent certificate prices. Even a discounting as opposed to total disregard of the 20-cent sales requires the Commission to note the tremendous impact of the actual volumes for such sales. If it be assumed that such sales in any event would have been certificated at the highest price deemed not suspect under the Commission's erroneous concept of that doctrine, i.e., 18.0 cents per Mcf, the weighted average price by this technique would be greater than 17 cents per Mcf.

G. Exclusion of Consolidated Temporary Sales

Thirty-two of the 36 contracts consolidated in the proceeding below for certification under Section 7 have flowing monthly volumes amounting to 16,484,300 Mcf at 14.65 psia. Estimated volumes under permanent certificates total 2,666,026 Mcf. The in-line price here certificated is, therefore, based on a line derived from only one-fifth of the volume of sales at issue. The tail is wagging the dog. The Commission's further action ignoring 1,962,797 Mcf (actual) or 1,515,650 Mcf (estimated) 20-cent sales volumes results in the price line being determined by less than one-eighth of the sales volume in Texas District No. 3. The refusal to consider actual volumes where known and available and reliance in lieu thereof on known inaccurate estimated data is totally unsupportable. The sometimes offered excuse of unavailable data is not valid here. The impact of the few estimate only volumes for 1962 is de minimus.

H. Intrastate Volumes and Non-Comparable Low-Priced Sales

The refusal by the Commission to consider increasing intrastate volumes in the face of decreasing interstate volumes[52] in determining the price line constitutes an arbitrary action by the Commission to arrive at a predetermined price line. In Opinion No. 383, *Texaco Seaboard, supra,* and *Hassie Hunt* Trust, Opinion No. 412, *supra,* the Commission in making a District No. 3 price line determination found only permanent non-suspect certificate sales at or above 14 cents per Mcf to be comparable. Certificates less than 14 cents were excluded. Yet, in this proceeding, again involving the price line determination for District No. 3, permanent

[52] III R. 222, 1364, 1491.

certificates at prices less than 14 cents were fully excluded in the weighted average price without any record finding of comparability. Such inclusion was arbitrary and unsupported by the record below and results in prejudicial error to Petitioner.

With one exception[53] every exclusionary and inclusionary ruling made by the Commission resulted in the lowering of the weighted average price and subsequent low price line determinations. Some, including the exclusion of the 20-cent Trunkline sales and settlements, were prejudicial errors which must be corrected to reflect the proper price line for the 1958-63 period. Other rulings, including the refusal to consider actual volumes and intrastate evidence, although individually not arbitrary and capricious to warrant reversal by this Court, when viewed from the impact of all such rulings require the finding that proposed prices are unduly low prices and are based on volumes that constitute hardly a fraction of the actual volumes flowing in District No. 3. The Commission, by distributor's intervention policy and the improper use of the suspect price doctrine, has disregarded the warning made to the Commission by the Ninth Circuit Court in *U.G.I.* v. *F.P.C.* that a price line should reflect current conditions in the industry and not reflect a rollback to prices having no current relevancy. A small number of contracts under which little gas moves, much of which is non-comparable, has determined the in-line price. Petitioner submits this Court in its CATCO and *Callery* decisions did not anticipate or intend this result to occur.

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[53] Certain sales by producers to Valley Gas Transmission held not comparable due to their purchases at less than the price line and eventual resale to interstate pipelines at a higher price.

IV. THE COURT OF APPEAL ERRED IN DECLARING THAT THIS COMMISSION MUST DETERMINE PUBLIC AND PIPELINE NEED FOR GAS IN PRODUCER CERTIFICATE PROCEEDINGS.

Petitioner hereby adopts Section IV of the Joint Petitioner-Producers' Brief on the issue of public need determination by the Commission in a producer certificate proceeding.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner prays that the judgment of the Court of Appeals be reversed and the case remanded with directions to vacate and set aside Commission's Opinion No. 475 and the orders thereof.

Respectfully submitted,

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Dated: December 13, 1967

APPENDIX "A"

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

ARTICLE V

Trials for crimes; just compensation for private property taken for public use.—No person shall be * * * * * deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

THE NATURAL GAS ACT

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, it the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such

facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bonafide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and———

[1] Subsection 7 (c) amended; (d), (e). (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

(d) (omitted)

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR SUPERIOR OIL COMPANY

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Dated: January 8, 1968

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REPLY BRIEF FOR SUPERIOR OIL COMPANY

ARGUMENT

The Superior Oil Company, Petitioner in No. 231, hereby replies to the opening brief for the Federal Power Commission, Petitioner in No. 144 and Respondent in Nos. 111, 143 and 231 on writs of certiorari to the United States Court of Appeals for the District

of Columbia Circuit decision reviewing Commission Opinion Nos. 475 and 476 (Texas Railroad District Nos. 3 and 2, respectively). Petitioner, in an effort to avoid duplication of argument, hereby adopts the Reply Brief of the Joint Petitioner-Producers' where not inconsistent with the position taken by The Superior Oil Company in its initial brief and this instant reply brief.

I

The Commission has properly taken the position[1] that price is an important part in their finding that Petitioner's proposed sales in District No. 3 is required by the public convenience and necessity. The certificate price allowed in the Section 7 proceeding will be the initial rate allowed until the just and reasonable determination and review is completed. The certificate price is intended to be the lowest reasonable rate that will assure continuing supplies for interstate consumption and yet give fair protection and encourage price stability for both the consumer and producer. Not even the Commission examiner in the Texas Gulf Coast Area Rate Proceeding, AR64-2, much less the full Commission, has decided to date what is the just and reasonable rate for Petitioner's 1958 sale in District No. 3.

The Commission price line approach properly admits to being founded on the Ninth Circuit decision in *United Gas Improvement Co.* v. *Federal Power Commission*,[2] 283 F. 2d 817, 824, cert. denied *sub nom.*

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[1] P. 19 Brief.

[2] P. 22 Brief.

Superior Oil Co. v. *United Gas Improvement Co.*, 365 U.S. 879. The court in that case and this Court in *Callery*[3] approving the Ninth Circuit held the price line required by CATCO[4] to afford consumer protection must be at the level where substantial amounts of gas entered the interstate market under contemporaneous certificates no longer subject to judicial review.

The Commission has properly adopted the Ninth Circuit suspect price doctrine wherein it held that the price line should be determined by a review of comparable non-suspect prices reflecting current conditions in the industry under which substantial interstate gas flowed. "Suspect" is defined by the Ninth Circuit and adopted by the Commission to be those prices "*still* subject to Commission or court review."[5] The refinements, the Commission acknowledged,[6] of the price line technique, including the proper ingredients that comprised a non-suspect price line, were not before this Court in *Callery*. At issue here is specific application of the suspect price doctrine to the record below to determine reliable prices for use in the average weighted price and resulting price line. Superior advocates and the Commission refuses the full consideration of all comparable relevant permanent certificates, final and no longer subject to review for use in the in-line price determination.

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[3] *U.G.I.* v. *Callery Properties*, 382 U.S. 223 (1965)

[4] *Atlantic Refining Company* v. *F.P.C.*, 360 U.S. 378 (1959).

[5] Brief p. 24. The acknowledgement suggests unequivocally that when no longer subject to review the price is no longer suspect.

[6] Brief p. 23.

II

The Commission, in an extended footnote,[7] attempts to justify why some nine 20-cent sales in District No. 3, that had been permanently certificated in proceedings and no longer subject to review, are without any probative value. Petitioner submits that its initial brief presents a complete discussion of the affirmative case for their full consideration. This reply brief will respond only to statements in the Commission Brief that when corrected will require this Court's confirmation that the Commission committed legal error in Opinion No. 475 by excluding or totally discounting these 20-cent sales as well as settlement prices from the price line determination.

a. *Pre-CATCO.* The Commission brief at page 38 states that the Commission in Opinion No. 475 regarded these sales as without value because "they were certificated prior to this Court's decision in CATCO, in proceedings in which certain of the Seaboard interests had been improperly denied the right to participate." Opinion No. 475 (III R. 7289-7311) at no point states or implies that certification of the 20-cent sales prior to this Court's CATCO was a factor in totally discounting the sales. The statement in the opening brief is a post hoc rationalization to defend a legally erroneous prejudicial ruling and is improper. *Northeast Airlines* v. *C.A.B.*, 331 F. 2d 579 (1 CCA 1963). *Burlington Truck Lines, Inc.* v. *U. S.*, 371 U.S. 156 (1962). Further, courts and the Commission have consistently held that pre-CATCO sales may be used in a price line determination. *Callery*, 382 U.S. 223, *State of California* v. *F.P.C.*, 353 F. 2d 16 (9 CCA 1965), *Union*

[7] Brief p. 38, footnote 25.

Texas Petroleum, et al., Opinion 436, et al., 32 FPC 254 (1964).

b. *Trunkline a Fully Contested Proceeding.* The Commission brief at page 38 states the Commission noted "that the failure of the Seaboard interests to pursue their challenge of those certifications was due solely to a procedural technicality and in no way suggests that the 20-cent prices would have been approved on the merits in a fully contested proceeding." This statement is a distortion of the facts. Let it not be forgotten who issued these certificates. The Commission is charged with the responsibility to regulate producers under the Natural Gas Act, not the Public Service Commission of the State of New York. The Commission did perform its administrative and quasi-judicial function. A full hearing before a duly appointed examiner and oral argument before the full Commission took place. Briefs to the examiner, exceptions to the examiner's decision and applications for rehearing were filed and considered. After full discussion and deliberation by the Commission 20¢ permanent certificates were issued.

These sales by producers on the Gulf Coast to Trunkline Gas Company for resale in the Michigan, Indiana, and Illinois areas were subjected to a full, fair and contested hearing. The following parties intervened and participated fully: State of Michigan; Michigan Public Service Commission; Michigan Gas Storage Co.; Consumer Power Company; Battle Creek Gas Co.; Michigan Gas Utilities Co.; Citizens Gas Fuel Co.; Illinois Power Co.; Board of Mayor and Aldermen of Mason, Tennessee; National Coal Association; United Mine Workers of America; and Michigan Consolidated Gas Co.

The refusal of any of these parties to seek judicial review, the fully contested nature of the proceeding, and the decision on the merits by the full Commission dictates the soundness of the Commission determination and justification for use in determining the line below. The absence of one party, Public Service Commission of the State of New York, as an intervenor whose constituents are not even the receivers of the proposed gas sale should not be now allowed to fully destroy the force and effect of that *considered* Commission decision.

c. *Trunkline Sales Not Erroneous.* The Commission brief at page 38 states the Commission is not required to perpetuate "a past error merely because the error was allowed to pass uncorrected at the time of the occurrence." It is presumed the "error" referred to is the Commission order denying intervention to P.S.C. of New York. However, the Commission procedure following the District Court decision[8] holding that a state regulatory agency as a matter of right could intervene in any proceeding before the Commission has been to allow such an agency's intervention upon the filing of notice. The "error" if any, has been corrected and is not perpetuated here.

If the "error" referred to is the issuance of 20-cent certificates to Trunkline, then this is the first time the Commission has ever suggested that these were erroneously issued certificates. These sales, almost ten years later, are still taking place. No individual Section 5(a) proceeding has been instigated against any of the sellers under these certificates. A presumption of soundness has long attached. They must be

[8] *P.S.C.* v. *F.P.C.*, 295 F. 2d 140 (CADC 1961)

taken as correct. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960). *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9 CCA 1965). These sales are in every way as proper as any other permanently certificated sale by the Commission. These sales have received no special corrective review by the Commission and are only subject, as is *every* sale in the Texas Gulf Coast, to the just and reasonable determination of AR64-2, et al. To label them erroneous prices at the Supreme Court level for the first time is unjustified. It constitutes an improper collateral attack on a valid Commission order when no direct attack on the order has ever taken place. No evidence or explanation whatsoever is on this record to support their characterization as erroneous. To require this Court at this stage to affirm a naked statement in brief without any record or opinion discussion forces unnecessary speculation of the highest order. *Burlington Truck Lines, Inc.* v. *U.S.*, 371 U.S. 156 (1962). The Commission does not point to its own failure but the failure of a single intervenor to perfect its appeal under the Natural Gas Act and the Administrative Procedure Act to avoid giving full weight to the 20-cent sales. Petitioner submits the "error" that is being perpetuated is not the existence of these 20-cent sales but the Commission refusal to have considered them fully in *Texaco Seaboard,* Opinion No. 383, 29 FPC 593 (1963) and then improperly adopting by reference that finding in *Hassie Hunt Trust,* Opinion No. 412, 30 FPC 1438 (1963) and in Opinion No. 475 below.

III

The Commission brief at page 38 of its brief alleges that Superior's argument that the Commission erred in

including certificated sales of less than 14 cents per Mcf is without merit. Superior's purpose in raising the point was to show the inconsistency of the Commission. The 14-cent sales were not considered in setting the line for District No. 3 in the *Texaco Seaboard* and *Hassie Hunt Trust* Opinions and yet were fully considered in the record below without any explanation on the record. However, the condemning answer given by the Commission to Superior's protest of their use is *"The sales in question are permanently certificated and entitled to the full weight given them."* No other reason is given. If 14-cent permanently certificated sales deserve full weight, why should not the 20-cent permanently certificated sales be given full weight? The only answer is that they should and must be given full weight also!

Statements by the Commission or any other party in this consolidated action that Superior has failed to make its proper objection to items that should have been included or excluded in the line determination in its petition for rehearing or petition for review are inaccurate.

> "A selective use of past comparative field price studies exclusively and the simultaneous disregard of all other evidence offered or available to the Examiner and the Commission is arbitrary, unfair and improper[9] . . . The Commission erred in determining . . . that two 'in-line' prices were appropriate for the period of sales contracted herein prior to and after the issuance of the Statement of General Policy 61-1 on Sept. 28, 1960. Such a method further shows the mechanical arbitrary approach used to defend and obtain the 16¢ per

[9] III R. 7440 Application for Rehearing, The Superior Oil Company.

> Mcf price found in . . . *Texaco Seaboard* . . . Reliance on the techniques and findings of other litigated cases to determine the evidence to be admitted and the proper initial price, alone should be cause for rehearing of this case . . .[10] The Commision erred in finding that 16¢ and 17¢ per Mcf were the proper prices for the periods prior to and after the issuance of the Statement of General Policy.[11] . . . The Commission asserts that all prices 17½¢ and above are considered suspect . . . Such use of the mangled suspect price approach is in error.[12]

Further, in Superior's petition for Review, Superior in Section IV stated:

> "Petitioner submits the Commission erred as follows: . . . (h) In applying faulty techniques to determine that the 'in-line' prices should be 16.0¢ and 17.0¢ per Mcf for the respective periods prior to and after September 28, 1960. . . . (r) In finding the proper initial price required by the present and future public convenience and necessity for the period prior to Sept. 28, 1960 to be 16.0¢ and for the period subsequent to Sept. 28, 1960 to be 17.0¢ per Mcf."

The techniques and methodology of in-pricing has therefore been properly raised by Superior in its Application for Rehearing and Petition for Review and is a proper matter for review and resolution by this Court. The issue of price line technique and determination includes not only the improper exclusion of 20-cent non-suspect Trunkline sales and other permanent final certificates resulting from contested and non-

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[10] III R. 7441 *ibid.*

[11] III R. 7442 *ibid.*

[12] III R. 7444 ibid.

contested proceedings and settlement orders but also the improper inclusion of 14-cent sales held not to be proper in other price line determinations in District No. 3. The general issue of necessary ingredients to be considered in a price line determination has been properly raised.

Respectfully submitted,

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Dated: January 8, 1968

SUPREME COURT OF THE UNITED STATES

Nos. 60, 61, 62, 80, 97, 111, 143, 144, 231.—
OCTOBER TERM, 1967.

Federal Power Commission, Petitioner, 60 *v.* Sunray DX Oil Company et al. The United Gas Improvement Company, Petitioner, 61 *v.* Sunray DX Oil Company et al. The Brooklyn Union Gas Company et al., Petitioners, 62 *v.* Federal Power Commission et al. Federal Power Commission, Petitioner, 80 *v.* Standard Oil Co. of Texas, etc., et al. The United Gas Improvement Company, Petitioner, 97 *v.* Sunray DX Oil Company.	On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.
Shell Oil Company, Petitioner, 111 *v.* Public Service Comm'n of New York. Skelly Oil Company et al., Petitioners, 143 *v.* Public Service Commission of New York et al. Federal Power Commission, Petitioner, 144 *v.* Public Service Commission of New York et al. The Superior Oil Company, Petitioner, 231 *v.* Federal Power Commission et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 6, 1968.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases present questions arising out of the issuance by the Federal Power Commission, pursuant to § 7 of the Natural Gas Act, 15 U. S. C. § 717f, of "permanent" certificates authorizing producers to sell natural gas to pipelines for transportation and resale in interstate commerce.

An understanding of the issues requires some background. Section 7 (c) of the Natural Gas Act provides that a natural gas company may engage in a sale of natural gas subject to the Commission's jurisdiction only if it has obtained from the Commission a certificate of public convenience and necessity. Such a "permanent" certificate may issue only after notice and hearing to interested parties, although a proviso to § 7 (c) enables the Commission in cases of emergency to issue temporary certificates without notice and hearing, pending the determination of an application for a permanent certificate. Section 7 (e) states that permanent certificates are to be granted if and only if the Commission finds that the proposed sale "is or will be required by the present or future public convenience or necessity . . . ." That section further provides that the Commission may attach to certificates "such reasonable terms and conditions as the public convenience and necessity may require."

Prior to 1954, the Commission construed the Natural Gas Act as empowering it to regulate only sales of gas by pipelines and not sales by producers. This Court held to the contrary in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. Since then, the Commission has been engaged in a continuing effort to adapt the provisions of the Act to regulation of producer sales. The method finally resolved upon for determining the "just and reasonable" rate at which § 4 of the Act requires that natural gas be sold was to conduct a number of area rate proceedings, looking to the establishment of maxi-

mum producer rates within each producing area. This method of regulation has recently been approved by us in the *Permian Basin Area Rate Cases*, — U. S. —. Other area rate proceedings are underway, and they will eventually encompass areas accounting for some 90% of all the gas sold in interstate commerce. See — U. S., at —, n. 18.

The decision to rely on area rate regulation as the means for establishing just and reasonable rates under §§ 4 and 5 of the Act, and its implementation, have thus far occupied more than a decade. During this period, the Commission was obliged to rest interim producer rate regulation on § 7. In the early years following this Court's first *Phillips* decision, *supra*, the Commission took a narrow view of its § 7 powers, and the field price of natural gas began to soar.[1] Matters came to a head in the so-called CATCO proceeding, in which the Commission certificated the sale of the largest quantity of natural gas theretofore dedicated to interstate commerce at a price above those then prevailing, on the ground that if it denied the certificate the refusal of producers to dedicate the gas might result in an eventual shortage in supply. This Court held in *Atlantic Ref. Co.* v. *Public Serv. Comm'n (CATCO)*, 360 U. S. 378, that the Commission should have done more.

The Court began in *CATCO* by stating that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. The Court then noted that the Act required that all rates charged be "just and reasonable." However, the Court stated that the determination of just and reasonable rates under §§ 4 and 5 was proving to be inordinately time-consuming, and that, because those rates became

[1] See generally Johnson, Producer Rate Regulation in Natural Gas Certification Proceedings: CATCO in Context, 62 Col. L. Rev. 773, 782–788 (1962).

effective only prospectively, the consumer had no protection from excess charges collected during the pendency of those proceedings. The Court said:

> "[T]he inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. . . . The fact that prices have leaped from one plateau to the higher levels of another . . . [makes] price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. . . . The Congress, in § 7 (e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise . . . , the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S., at 391.

After the *CATCO* decision, the Commission, under the scrutiny of the courts, began to work out a system for determining the maximum initial prices at which gas should move, pursuant to contracts of sale, during the interval preceding establishment of just and reasonable rates. It based this "in-line" price upon current prices for gas in the area of the proposed sale, taking into account the possibility that the proposed rate might result in other price rises due to most-favored-nation clauses.[2] The Commission and courts generally excluded from consid-

[2] See, *e. g.*, *United Gas Improvement Co.* v. *Federal Power Comm'n*, 283 F. 2d 817; *Public Serv. Comm'n* v. *Federal Power Comm'n*, 287 F. 2d 146; *United Gas Improvement Co.* v. *Federal Power Comm'n*, 287 F. 2d 159; *United Gas Improvement Co.* v.

eration or gave diminished weight to those current prices which were "suspect" because they were embodied in permanent certificates still subject to judicial review; because they were contained in temporary certificates issued on the *ex parte* representations of producers; or because they had been certificated in proceedings which occurred before this Court's *CATCO* decision or in proceedings from which representatives of East Coast consumers and distributors (commonly referred to as the "seaboard interests") had been erroneously excluded.[3] After some hesitation,[4] the Commission decided to bar producers from presenting cost evidence at in-line price proceedings, on the ground that its admission would make the hearings too long drawn out. After determining the in-line price, the Commission conditioned the permanent certificate to provide that the producer could not initially sell the gas at a greater price. The Commission also began to condition certificates so as to limit the level to which the price might be raised, pursuant to escalation clauses in the contract, during a given period or pending completion of the relevant area rate proceeding.[5]

Federal Power Comm'n, 290 F. 2d 133, 147 (two cases); *California Oil Co., W. Div.* v. *Federal Power Comm'n*, 315 F. 2d 652.

A two-party most-favored-nation clause assures a producer that he will receive the highest price currently being paid by his purchaser to any producer in the same area. A three-party most-favored-nation clause guarantees a producer the highest price presently being paid to any producer in the area by any purchaser. See, *e. g., Pure Oil Co.*, 25 F. P. C. 383.

[3] See, *e. g., United Gas Improvement Co.* v. *Federal Power Comm'n*, 283 F. 2d 817; *United Gas Improvement Co.* v. *Federal Power Comm'n*, 287 F. 2d 159; *Texaco Seaboard, Inc.*, 29 F. P. C. 593; *Hassie Hunt Trust (Operator)*, 30 F. P. C. 1438, aff'd *sub nom. Continental Oil Co.* v. *Federal Power Comm'n*, 378 F. 2d 510.

[4] See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223, 228, n. 3.

[5] See, *e. g., Placid Oil Co.*, 30 F. P. C. 283. In 1961, the Commission by rule prospectively limited the forms of the escalation clauses themselves. See *infra*, n. 6.

This Court generally approved this method of regulation in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223. There the Court held that the Commission might properly refuse to hear cost evidence in in-line proceedings, and that the Commission might impose moratoria on price increases above specified levels. The Court also held in *Callery* that when issuance of permanent certificates is held on judicial review to have been erroneous, the Commission may on remand insert in the new certificates conditions requiring refund of amounts collected under the erroneously issued certificates in excess of the subsequently determined in-line price.

The cases now before us originated in producer applications for permanent certificates to sell gas produced in three Texas Railroad Commission districts on the Texas Gulf Coast, under contracts entered into between 1958 and 1963. The Commission's conditional certification of proposed sales in District 1, 31 F. P. C. 623, was appealed to the Court of Appeals for the Tenth Circuit. That Court upheld the Commission's price line against challenges by both producers and the seaboard interests, rejecting in particular the charge of the seaboard interests that the Commission erred in taking account of prices at which gas had been sold under temporary certificates. 370 F. 2d 181. In the same opinion, the Tenth Circuit stated that the Commission had no power to order refunds of amounts collected by producers in the past under temporary certificates which contained no refund conditions and had not been appealed, and it subsequently reiterated that view in reversing on appeal a Commission decision, 36 F. P. C. 309, ordering the District 4 producers to make such refunds. 376 F. 2d 578.

Orders of the Commission conditionally certificating the proposed sales in Districts 2 and 3, 34 F. P. C. 897, 930, were appealed together to the Court of Appeals

for the District of Columbia Circuit. In a single opinion, that court held that in the circumstances of the cases before it the Commission had erred in giving weight to sales under temporary certificates when it set the in-line prices. No issue as to refund power was raised in the District of Columbia appeal, but the court did hold that the Commission committed further error in reserving to pipeline proceedings the question, raised by seaboard interests, of whether there was a public need for the gas which was to be sold. — U. S. App. D. C. —, 373 F. 2d 816.

We granted certiorari and consolidated the cases for argument, 389 U. S. 811, to consider the following matters: (1) Did the Commision err in determining the in-line prices here in issue? (2) May the Commission order refunds of amounts collected under unconditioned temporary certificates in excess of the eventually determined in-line price? (3) Must the Commission, on request of interested parties, decide in the certification proceeding itself whether the gas to be sold is actually needed by the public, or may it properly deal with that issue only in pipeline proceedings? For reasons which follow, we affirm the decision of the Court of Appeals for the Tenth Circuit and reverse that of the Court of Appeals for the District of Columbia Circuit on the in-line price question. We reverse the decision of the Tenth Circuit on the refund issue and that of the District of Columbia Circuit on the matter of "need." We uphold the orders of the Commission in full.

I.

The first issue is whether the Commission acted correctly in setting the in-line prices here under review. In order adequately to resolve that question, it is necessary to have a more precise idea of the functions of in-line prices.

One function of an in-line price is that it serves as a "ceiling" on the rate at which gas may be sold under the certificate containing the price condition. However, its effect in preventing contractually authorized price rises is legally limited, for under § 4 of the Act a producer is free, upon 30 days' notice to the Commission, to raise his price to the extent that his contract permits, subject to the Commission's power under § 4 (e) to suspend the effectiveness of the increase for a period of five months and to order refunds if the increased rate turns out to be higher than the just and reasonable rate thereafter found for the area.[6]

A second function of an in-line price is that it constitutes a "floor" below which the Commission may not order refunds under § 4 (e) of the Act. Section 4 (e) states that upon the filing of a § 4 rate increase, the Commission may on its own authority undertake a hearing to determine whether the rate is just and reasonable, simultaneously suspending the rate increase for up to five months. If the suspension period expires before the completion of the hearing, the Commission may

> "by order, require the natural-gas company to furnish a bond . . . to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase . . . , and, upon completion of the hearing

[6] In the cases before us, the Commission did utilize its auxiliary power, see *supra*, at 5–6, to limit the amount of such § 4 increases, but the producers remained free after six months (*i. e.*, 30 days' notice plus five months' suspension) to raise their prices at least 10%, if their contracts permitted. In 1961, after many of the contracts in these cases had been entered into, the Commission issued a rule which prospectively limited the types of escalation clauses which might be included in contracts. See Order No. 232, 25 F. P. C. 379. This order was modified by Order No. 242, 27 F. P. C. 339. See also 18 CFR § 154.93; *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U. S. 33, 42–44.

> and decision, to [*sic*] order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

The Commission's practice has been that when a producer files a rate increase on a contract in an area where an area rate proceeding is in progress, his application is consolidated into the area rate proceeding, thereby rendering him subject to the refund provision of § 4 (e).[7]

It has sometimes been contended that when a producer operating under a nonreviewable permanent certificate increases his price under § 4, the permanently certificated price is not a lower limit on the refund power, and that if the eventual just and reasonable area rate is below the permanently certificated price, the Commission may order a refund not merely of the price increase but of the entire difference between the increased rate and the just and reasonable rate.[8] The Commission has never passed on this contention,[9] and this Court has twice rejected it in dictum. In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 146, the Court interpreted § 4 (e) as meaning that "the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase." In *Callery, supra*, the Court stated that "The fixing of an initial 'in-line' price establishes a firm price at which a producer may operate, pending determination of a just and reasonable rate, without any contingent obligation to

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[7] See, *e. g.*, 30 F. P. C. 1354, 1357.

[8] See, *e. g.*, 2 Joint Initial Staff Brief, Hugoton-Anadarko-Texas Gulf Coast Area Rate Proceedings, F. P. C. Docket Nos. AR 64–1 and AR 64–2, at 486–488.

[9] The Commission specifically reserved decision of this question in its decision in the Permian Basin area rate proceeding. See 34 F. P. C. 1068, 1074–1075.

make refunds should a just and reasonable rate turn out to be lower than the 'in-line' price." 382 U. S., at 227.

We adhere to the dicta in *Callery* and *Sunray Mid-Continent*. That outcome comports better with the language of § 4 (e) than does the alternative. It is true that § 4 (e) in terms gives the Commission power to refund "the portion of such increased rates or charges" found to be excessive, and does not expressly limit the refund to the rate increase or increment. However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the "amounts received by reason of such increase." If it had been intended that the refund obligation should extend to greater amounts, the accounting requirement logically should have extended to them also. Viewing the Act more broadly, there is another reason why this interpretation of § 4 (e) is preferable. It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase his price, the Commission may not order him to make refunds simply because the just and reasonable rate for his area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power.[10] It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if he had never increased his price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4 (e).

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[10] See, *e. g.*, *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618; *Montana-Dakota Utils. Co.* v. *Northwestern Public Serv. Co.*, 340 U. S. 246, 254.

Since an initial price and a refund floor conceivably may serve significantly different ends,[11] we shall give separate consideration to these two functions of the in-line prices now under review. It is appropriate to begin with the initial price function, because in the proceedings before us the Commission apparently viewed the in-line prices it was setting almost entirely as initial prices and gave no explicit consideration to their effects as refund floors.[12]

A.

The thrust of this Court's *CATCO* opinion was that the Commission should use its § 7 conditioning power to prevent large jumps in initial contract prices, pending the determination of just and reasonable rates. At one time, the Commission apparently hoped that by receiving abridged cost evidence it could established maximum initial prices which would be near approximations of the just and reasonable rates which would later be established. The Commission eventually concluded that this hope was ill-founded, and in *Callery* this Court approved the Commission's exclusion of cost data from certification hearings. See 382 U. S., at 228 and n. 3.

In view of the Commission's decision to rely solely upon contemporaneous contract prices in setting initial rates, there can be no assurance that an initial price arrived at by the Commission will bear any particular relationship to the just and reasonable rate. Any such assurance would necessarily be based on a belief that the current contract prices in an area approximate closely the "true" market price—the just and reasonable rate. Although there is doubtless some relationship, and some

[11] For example, in some situations a relatively high initial price might be thought desirable to encourage producers to develop new reserves but a lower refund floor might be deemed necessary to protect consumers.

[12] See 31 F. P. C., at 629–637; 34 F. P. C., at 900–904, 933–938.

economists have argued that it is intimate,[13] such a belief would contradict the basic assumption that has caused natural gas production to be subjected to regulation and which must have underlain this Court's *CATCO* decision—namely, that the purchasing pipeline, whose cost of purchase disappears into a rate base on which a rate of return is assured at public expense, lacks sufficient incentive to bargain prices down.[14]

One way in which the Commission might have fulfilled the *CATCO* mandate to ensure that the lack of purchaser bargaining incentive did not result in too drastic an interim price rise would have been to freeze prices at their pre-*CATCO* levels. However, this would have resulted in locking into the price structure some of the abrupt leaps in price which had occurred prior to *CATCO*, as well as risking the eventual erosion of producer incentive through disregard of rising costs. Hence, it was reasonable for the Commission to set initial prices by reference to contemporary contract prices, which, though not an accurate reflection of the "true" market price, were the only indirect evidence available to the Commission of cost trends. And it was also within the Commission's discretion to exclude, where possible, those contract prices still subject to Commission and court review, because those prices might reflect price jumps impermissible under *CATCO*.

Thus, the initial price doctrine as it had developed by the time of *Callery*, see 382 U. S., at 226–228, was a rational and permissible way of implementing the *CATCO* requirement. Turning to the particular proceeding now under review, we hold that the methods

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[13] See, *e. g.*, M. Adelman, The Supply and Price of Natural Gas 25 (1962).

[14] See, *e. g.*, *Permian Basin Area Rate Cases*, — U. S., at — — —; E. Neuner, The Natural Gas Industry 148–177, 209–290 (1961).

there used by the Commission were also acceptable ways of determining initial prices.

On September 28, 1960, the Commission began its post-*CATCO* regulation of sales in the districts here involved by issuing its Statement of General Policy No. 61–1, 24 F. P. C. 818. The Policy Statement announced the ceiling price at which new sales would be certificated in each district. For each of Texas Railroad Commission Districts 2, 3, and 4, the Policy Statement ceiling was 18¢ per Mcf (thousand cubic feet) of gas. With respect to District 4, the Commission on August 30, 1962, determined an in-line price of 15¢ per Mcf for sales contracted prior to September 28, 1960, the date of the Policy Statement. 28 F. P. C. 401. That decision is not in issue here. On the same date, the Commission scheduled a proceeding, known as the *Amerada* preceding, to determine the in-line price for sales contracted between September 28, 1960, and August 30, 1962. 28 F. P. C. 396.

On March 23, 1964, the Commission terminated the *Amerada* proceeding by issuing the first of the orders here under review. 31 F. P. C. 623. The Commission determined that the in-line price for the period under study should be 16¢ per Mcf. In reaching this conclusion, the Commission relied primarily on a comparison of prices in contracts entered into during the two-year life of the Policy Statement and the preceding two years, on the ground that the in-line price should mirror the price at which substantial quantities of gas were currently moving in interstate commerce.

This desire to reflect current conditions also caused the Commission to give some weight to prices under temporary certificates, because only 1.4% of the gas in the area was currently moving under permanent certificates. The Commission recognized that these temporary prices were "suspect," and that they largely consisted of the very

prices whose "in-lineness" was then being determined. However, the Commission decided that the risk of considering such prices was overbalanced by the fact that not to take them into account would be to ignore the prices at which the great bulk of gas was then moving in commerce. The Commission did take the unreliability of the temporary prices into consideration when it refused to accept the 17.2¢ average contract price for all sales as the in-line price, relying as well upon its belief that "the teachings of *CATCO* require that we draw the line at the lowest reasonable level." 31 F. P. C., at 637. The Commission also placed "some measure of weight" on its Policy Statement guideline price promulgated in 1960. The Commission further noted that 82% of the gas sold under post-Policy Statement contracts moved at 16¢ or more per Mcf, and stated that "In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications." 31 F. P. C., at 636–637.

On appeal, the Tenth Circuit approved the Commission's partial reliance upon temporary prices and upon its Policy Statement. 370 F. 2d 181. That decision is challenged by the seaboard interests, who claim that the Commission's reliance upon these "improper" factors caused it to set too high a price for the post-Policy Statement period.

We cannot conclude, given the extraordinary discretion which necessarily attends such a finding as the Commission was required to make, that the Commission took into account any impermissible factors or that the resulting initial price was too high as a matter of law. The seaboard interests apparently concede that contract prices are relevant in fixing initial prices, for they do not object to the Commission's consideration of permanently certifi-

cated prices. They complain only of the weight given the guideline and temporarily certificated prices. However, permanently certificated prices are germane only because they provide some indication of cost trends. See *supra*, at 11–12. Guideline and temporary prices may serve the same function.

The Commission's District 4 guideline price, though its exact level was admittedly arbitrary, did place a "lid" on contract prices in the area for the period. The guideline price was therefore relevant to the determination of initial prices insofar as contract prices in the area would have been higher but for the guideline price, and to the extent that those higher prices would have represented cost trends and not merely the absence of a free market. The Commision evidently did not give the guideline price great weight, since it set the initial rate some 2¢ lower. We think that the weight given was justified.

Consideration of the temporary prices was also warranted because they pointed to cost trends, especially in light of the fact that 98.6% of the gas was presently flowing under temporary certificates. Their use had an additional justification. In District 4, the seaboard interests evidently challenged almost all applications for permanent certificates at prices above 15¢ per Mcf, thereby greatly delaying the issuance of permanent certificates at higher levels.[15] Had the Commission refused to consider any but permanently certificated prices in setting the initial price, it would in effect have allowed the seaboard interests to determine that price. We consider that the Commission did not abuse its discretion in giving the temporary prices some weight.

Finally, we hold that the ceiling price of 16¢ was within the "zone of reasonableness" within which the courts may not set aside rates adopted by the Commis-

[15] See Brief for Sunray DX Oil Company et al., at 11, 23–26.

sion, see, *e. g., Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585–586, and that it fulfilled the *CATCO* mandate not to allow abrupt price rises. The 16¢ price was at the lower end of the spectrum of current prices considered by the Commission, and it embodied only a 1¢ price rise.

To determine the in-line prices in Texas Railroad Districts 2 and 3, for which the Policy Statement had also set a ceiling price of 18¢ per Mcf for sales after September 28, 1960, the Commission set two separate proceedings. The District 2 or *Sinclair* proceeding, scheduled on March 25, 1964, involved the establishment of in-line prices for sales under contracts executed between May 12, 1958, and January 1, 1964.[16] The District 3 or *Hawkins* proceeding, initiated on March 30, 1964, involved sales under contracts executed between September 16, 1958, and October 1, 1963. See 31 F. P. C. 725. In both proceedings, the Commission began by dividing all of the sales in question into two groups, those contracted prior to the date of the Policy Statement and those contracted afterward. The two proceedings were terminated by two Commission orders of September 22, 1965, determining in-line prices for each area during each period. 34 F. P. C. 897, 930.

In the District 2 or *Sinclair* proceeding, the Commission set an initial price of 15¢ per Mcf for the pre-Policy Statement period and 16¢ for the later period. The 15¢ price is not here in issue. The seaboard interests contend that the 16¢ price was too high. In fixing the 16¢ price, the Commission took into account five factors. First, it apparently gave full weight to the permanently certificated prices at which about 40% of the gas in the area was currently moving. Second, it gave some but "not undue" force to the temporary prices at

[16] See 4 Joint Appendix 128.

which 60% of the gas currently flowed. Third, it assigned "some weight" to the original, unconditioned contract prices in the area, on the ground that those prices "do show economic trends in the area." 34 F. P. C., at 937. Fourth, the Commission took into consideration the 16¢ volumetric median price and the 15.29¢ volumetric weighted average price of all permanently and temporarily certificated sales in the area after the date of the Policy Statement. Fifth, it took into account the fact that 53% of the gas in the area was presently moving at prices at or below 16¢.

In the District 3 or *Hawkins* proceeding, the Commission fixed an initial price of 17¢ per Mcf for the post-Policy Statement period and reaffirmed an earlier-established 16¢ initial price for previous sales. The seaboard interests attack the 17¢ price as too high. Superior Oil Company asserts that both prices are too low. We confine ourselves at present to the contention of the seaboard interests. In arriving at the 17¢ price, the Commission considered five factors. First, it gave full weight to the permanently certificated sales of moderate volumes of gas at 15¢ and 16.2¢, a small volume at 16.5¢, and large volumes at 18¢. Second, it accorded "some weight" to temporary prices. Third, it noted that the 17¢ price "[reflects] the weighted average price of 16.17 cents" for permanently certificated sales. 34 F. P. C., at 903. Fourth, it gave "some weight" to original, unconditioned contract prices, for exactly the same reason as in *Sinclair*. See 34 F. P. C., at 902. Fifth, the Commission took into consideration the fact that 43% of all permanently certificated sales in the area were at prices at or above 17¢.

On appeal, the Court of Appeals for the District of Columbia Circuit sustained the challenge of the seaboard interests to both the *Sinclair* and *Hawkins* post-Policy Statement prices, holding that it was error for the Commission to give any consideration to temporary and un-

conditioned contract prices. — U. S. App. D. C. —, 373 F. 2d 816. That decision is attacked by all of the producer parties.

The producers assert that the Court of Appeals erred in holding that the Commission should not have taken into account temporary and unconditioned contract prices when it fixed the post-Policy Statement prices for Districts 2 and 3. We sustain this contention. It is true that in Districts 2 and 3 a much larger percentage of the gas was currently moving under permanent certificates than in District 4. However, for reasons which appear in our discussion of the District 4 proceedings, see *supra*, at 14–15, the temporary and unconditioned contract prices were nonetheless germane as indicating cost trends.[17] The Commission acknowledged their relative unreliability by according them only a diminished force. In these circumstances, we cannot conclude that the Commission exceeded its authority by giving them any weight at all.

Nor do we find any error in the Commission's selection of the 16¢ and 17¢ initial prices from the information before it. Although these prices, and particularly the 17¢ price in *Hawkins*, ranged nearer the high end of the price spectrum than did the District 4 price, we cannot say that either was so high as to fall outside the "zone of reasonableness" within which the Commission has rate-setting discretion. See *supra*, at 15–16. And since the initial prices decided upon were only 1¢ above those previously prevailing, they did not breach the *CATCO* directive to avoid excessively large price increases.

The Superior Oil Company contends that the initial prices established in District 3 for both the pre- and

[17] The seaboards interests apparently followed the same course in Districts 2 and 3 as in District 4, challenging all applications for permanent certificates at prices above 15¢ per Mcf. See Brief for Shell Oil Company et al., at 6–8, 19–21.

post-Policy Statement periods were too low for a number of reasons, mainly because the Commission excluded from consideration certain relatively high prices at which gas was presently being sold in the area. All of these challenges were rejected by the Court of Appeals for the District of Columbia Circuit.

The data considered by the Commission in setting the 17¢ District 3 post-Policy Statement price have already been described. See *supra*, at 17. In establishing the 16¢ pre-Policy Statement price, the Commission took into account four factors. First, it gave full force to permanently certificated sales of small volumes of gas at prices below 16¢ and of comparatively large volumes at 16¢ and 16.2¢. Second, it took into consideration the fact that 72% of all sales, comprising "a little more than half" the total volume of gas, occurred at prices of 16¢ or less. Third, the Commission gave "some weight" to permanently certificated sales of very large volumes of gas at 17.5¢ or above, even though it regarded those prices as suspect. Fourth, the Commission apparently took into account the weighted average price of 15.16¢ for all sales except the suspect sales at 17.5¢ and above.

Superior's most strongly pressed contention is that the Commission erred in allegedly failing to consider nine large-volume sales at 20¢ per Mcf when it set the 16¢ initial price for the pre-Policy Statement period. The Commission recognized in its opinion that the inclusion of these sales at full strength would have a "strong [upward] effect" upon the average of all prices for the period. However, it concluded that the impact of the price should be "discounted." The Commission noted that

> "six of the nine sales were involved in *Trunkline Gas Co., et al.*, 21 FPC 704 . . . , with respect to which [the New York Public Service Commission's] petition for review was dismissed because not timely." 34 F. P. C., at 902.

The Commission then quoted from an earlier decision, *Texaco Seaboard, Inc.*, 29 F. P. C. 593, 597, in which it discounted the effect of the same sales on the ground that they "would have been set aside, for failure to permit a proper party to intervene, save for the procedural defect in the PSC review action in the *Trunkline* case." The Commission went on to point out that two of the three remaining 20¢ sales also had been certificated in proceedings from which the exclusion of the New York Commission had been upheld on the same procedural ground.[18]

We think that the Commission acted within its discretion in discounting the force of these 20¢ sales. Those sales were out of line with respect to the price structure which emerged after *CATCO*, and the Commission had reason to believe that they would have been set aside on judicial review had it not been for a procedural defect. We do not think that the Commission was compelled to give full weight to these prices.

Superior also contends that the initial prices established for the pre-Policy Statement period were too low because the Commission excluded from consideration a number of 1955–1956 sales at 17.5¢ to Coastal Transmission Company. In justification for giving discounted effect to these prices, the Commission again cited its *Texaco Seaboard* decision, 29 F. P. C. 593, in which it also discounted those sales. Among the justifications put forward in *Texaco Seaboard* was the fact that Coastal was at the time of the sales a new pipeline company, which neither had a certificate nor was yet in operation, so that the prices may have included a higher-than-normal allowance for risk. We think that this factor

[18] See 34 F. P. C., at 902, n. 3. It appears that the last of the sales was also in this category. See *ibid.*; 3 Joint Appendix 131, 136, n. d; *Austral Oil Co.*, 22 F. P. C. 658, 858.

alone was sufficient to justify the Commission's exercise of discretion in discounting these sales.

Superior next asserts that with respect to both time periods the Commission erred in failing to take account of certain prices embodied in settlement orders. It is conceded by Superior that all of these settlements occurred at the then-prevailing guideline or in-line prices enforced by the Commission.[19] We hold that the Hearing Examiner and the Commission had discretion to disregard these sales, since they did not supply independent evidence of market trends.

Superior further complains of the Commission's alleged failure to take enough notice of temporary prices and its refusal to consider prices of intrastate sales. The Commission did give some consideration to temporary prices, see *supra*, at 17, 19, and for reasons which appear sufficiently from what has gone before, see *supra*, at 12, we hold that it did not err in refusing to give them more weight. We also hold that the Commission acted within its discretion when it rejected evidence of intrastate prices submitted by the producers on the ground that:

> "these prices do not cover the entire area nor is there anything to show that they are representative so as to make them comparable to the interstate arrays." 34 F. P. C., at 904.

Finally, Superior asserts that the Commission acted incorrectly in relying on estimated rather than actual volumes of gas sold during both periods. We find acceptable the Commission's justification, which was that actual volumes were not known for the years 1962 and 1963. Moreover, use of actual volumes would have made no significant difference, since Superior agrees[20]

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[19] See Brief for the Superior Oil Company 36, n. 48.

[20] See *id.*, at 39–40.

that the only result would have been to give enhanced force to the 20¢ sales, which properly were given only slight weight.[21]

B.

We now turn to the question whether the price levels established by the Commission in these proceedings were proper when regarded as refund floors. This Court stated in *CATCO* that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. Since the Natural Gas Act nowhere refers to "in-line" prices, the "excessive rates" referred to must be rates in excess of the just and reasonable rate at which § 4 (a) commands that all gas must move. Logically, this would seem to imply that to assure the "complete, permanent and effective bond of protection" referred to, any rate permitted to be charged during the interim period before a just and reasonable rate can be determined must be accompanied by a condition rendering the producer liable for refunds down to the just and reasonable rate, should that rate prove lower than the initial rate specified in the certificate.

Despite this apparent logic, the Commission seems never to have imposed a refund condition of this type, though it has occasionally considered the function of an in-line price as a refund floor in determining the level of

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[21] Superior also claims that the Commission abused its discretion by considering sales at prices below 14¢ in fixing the initial rates for both periods, even though it had excluded such sales in previous District 3 in-line proceedings. Superior did not mention this point in its petition for rehearing before the Commission. See 3 Joint Appendix 314 (i); Exceptions of the Superior Oil Company to the Decision of the Hearing Examiner, *In the Matter of H. L. Hawkins & H. L. Hawkins, Jr. (Operator)*, F. P. C. Docket No. G–18077. Hence, the question is not properly before us. See Natural Gas Act § 19 (b), 15 U. S. C. § 717r (b).

the price.[22] The courts seem never to have suggested that the Commission impose such conditions. In *Callery, supra,* this Court without dissent approved the Commission's imposition of an initial price unaccompanied by any such refund condition. The *Callery* Court also held, over a single dissent, that in compelling producers to refund excess amounts charged under permanent certificates later invalidated on judicial review,

> ". . . the Commission could properly measure the refund by the difference between the rates charged and the 'in-line' rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the 'just and reasonable' rate could be determined. We have said elsewhere that it is the duty of the Commission, 'where refunds are found due, to direct their payment at the earliest possible moment consistent with due process.' *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 155." 382 U. S., at 230.

In view of the fact that an initial price and a refund floor might be used to achieve distinct regulatory goals, see *supra,* n. 11, it seems regrettable that the Commission and courts apparently have never entertained the possibility of separating these two aspects of an "in-line price" in particular cases. However, we think that in light of *Callery* and the other precedents the Commission was not obliged in this instance to give explicit consideration to the establishment of a distinct refund floor. The same factors are present here as in *Callery.* The need to speed refunds to consumers and to assure producers of a firm price are identical. We cannot say, therefore, that the Commission breached any duty in failing expressly to consider whether the prices it fixed were suitable when regarded as refund floors.

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[22] See, *e. g., Texaco Seaboard, Inc.,* 29 F. P. C. 593, 599.

Although we have approved the in-line prices in these cases when looked at as initial prices, we have yet to examine them in their role as refund floors. Viewing them in that way, we hold that they were not impermissibly high. In the District 4 or *Amerada* proceeding, the only disputed price is the 16¢ price for the post-Policy Statement period. The Commission fixed that price at a point near the lower end of the price range suggested by the price evidence before it, stating:

> "While there is evidence that points in the direction of a higher price we believe that the teachings of *CATCO* require that we draw the line at the lowest reasonable level." 31 F. P. C., at 637.

We consider that the 16¢ price was not beyond the Commission's power, when regarded as a refund floor.

In the District 2 or *Sinclair* proceeding, the only price assailed as too high is the 16¢ price for the post-Policy Statement period. That price was nearer the high end of the spectrum of suggested prices than was the price established in District 4. The Commission did not enunciate the general principle which motivated it in selecting the 16¢ price level.[23] Although it would have been preferable for the Commission to have explained its reasoning, we believe that the price was permissible when regarded as a refund floor. The 16¢ price embodied an increase of only 1¢ per Mcf over the previ-

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[23] The Hearing Examiner, who also arrived at a 16¢ price, apparently relied upon a general standard different from that used by the Commission in the District 4 or *Amerada* proceedings, *supra*. Quoting from the Commission's opinions in *Texaco Seaboard, Inc.*, 27 F. P. C. 482, 485, and *Hassie Hunt Trust (Operator)*, 30 F. P. C. 1438, 1445, the Examiner said:

"'. . . the price line does not accord with the highest price or prices permanently authorized but falls between the highest group of prices and the median price.'" 34 F. P. C., at 952.

ously prevailing price. Such evidence as is now available indicates that the 16¢ price probably will not exceed the just and reasonable price which will be established for the Texas Gulf Coast in a pending area rate proceeding.[24] In addition, we are not unmoved by the obvious desirability of bringing to a close this already prolonged proceeding, which belongs to an era of the regulation apparently now ended.[25] We therefore hold that, despite the weaknesses in the Commission's opinion, the price established was within the Commission's authority when seen as a refund floor.

In the District 3 or *Hawkins* case, the only price challenged as excessive is the 17¢ price for the post-Policy Statement period. The District 3 proceeding was similar to that in District 2 (*Sinclair*). The price decided upon was again nearer the high end of the suggested range than that in District 4; again the Commission did not articulate the general principles which motivated it.[26] The District 3 price is even more vulnerable to attack than that in District 2, because it is 1¢ higher and there-

[24] The Commission staff has recommended a just and reasonable rate of 16.8¢ per Mcf for new gas-well gas sold in the Texas Gulf Coast under contracts dated after December 31, 1960, and delivered at a central point. See 2 Joint Initial Staff Brief, Hugoton-Anadarko-Texas Gulf Coast Area Rate Proceedings, F. P. C. Docket Nos. AR 64–1 and AR 64–2, at 375. The suggested just and reasonable rate for post-1960 new gas-well gas delivered at the wellhead is 16.4¢ per Mcf. *Ibid.* About 90% of Texas Gulf Coast gas is centrally delivered. See *id.*, at 390–391.

[25] During oral argument, counsel for the Commission stated that the Commission has suspended all contested in-line price proceedings pending completion of the area rate proceedings for the areas involved. The just and reasonable rates determined in those proceedings apparently will automatically become the in-line prices for those areas. Cf. *Permian Basin Area Rate Cases*, — U. S., at —, n. 114.

[26] The Hearing Examiner was equally unspecific. See 34 F. P. C., at 914 *et seq.*

fore more likely to be above the just and reasonable rate for the Texas Gulf Coast. Yet similar considerations lead us to approve it as being within the Commission's broad discretion. The 17¢ price represented only a 1¢ increase over the previous District 3 price. The fragmentary evidence now available about the forthcoming just and reasonable rate indicates that it will be only slightly, if at all, below 17¢.[27] It is again desirable that a prolonged and outmoded proceeding be brought finally to a close. Hence, we are constrained to hold that the 17¢ District 3 price was not excessive as a matter of law, when looked at as a refund floor.

II.

The next major issue is whether the Commission acted within its powers when it ordered the producers in the District 4 or *Amerada* proceeding to refund amounts previously collected under unconditioned temporary certificates, to the extent that the prices charged under those certificates exceeded the eventual in-line price.

A.

Section 7(c) of the Natural Gas Act, 15 U. S. C. § 717f (c), contains a proviso which permits the Commission to "issue a temporary certificate in cases of emergency, to assure maintenance of service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate." Most of the producers involved in the *Amerada* proceeding applied for and were granted such temporary certificates, authorizing them to sell gas at or below the then-guideline price of 18¢ per Mcf. The "emergency" which most of these producers cited to justify the issuance of the certificates was an economic emergency which threatened them with loss of all or part of their gas supply unless deliveries could

[27] See *supra*, n. 24.

begin.[28] Eight of the certificates contained a condition specifying that should the eventual in-line price be lower than that charged under the certificate, a refund of the difference might be ordered. The other certificates did not include an express refund condition, although they did contain general cautionary language respecting further Commission action.[29]

The history of the refund orders now under review is as follows. When seaboard interests proposed the retroactive imposition of refunds in virtually identical circumstances in the 1962 *Skelly Oil Company* proceeding, the Commission decided not to order refunds because "the producers here have been operating . . . pursuant to effective temporary certificates containing no price condition, the validity of which have never been challenged on appeal." 28 F. P. C. 401, 413. In denying rehearing in *Skelly*, the Commission amplified its reasons, stating that because there was in the temporary certificates no explicit language to warn the producers of the possibility of a refund, "to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds." 28 F. P. C. 1065, 1069. While *Skelly* was pending on appeal in the District of Columbia Circuit, the seaboard interests moved the Commission to insert prospective refund conditions in the temporary certificates of producers in the *Amerada* proceeding now before us. In denying that request, the Commission stated that, because the producers had relied on the absence of refund conditions

[28] See Brief for the Federal Power Commission 49, n. 37.

[29] The certificates contained provisions to the effect that:

"This acceptance for filing shall not be construed as constituting approval of any rate . . . ; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation . . . ; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding . . . ." See, *e. g.*, 1 Joint Appendix 71–72.

when they dedicated their gas to interstate commerce, to impose prospective refund conditions would "so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy." 29 F. P. C., at 225.

The Court of Appeals for the District of [redacted] Circuit held on appeal in *Skelly*, — U. S. App. D. C. —, 329 F. 2d 242, not only that the Commission had power to order retroactive refunds but that in the *Skelly* proceeding itself it should subject the question to "a broader and more penetrating analysis." — U. S. App. D. C., at —, 329 F. 2d, at 250. In its subsequent in-line price decision in *Amerada*, the Commission noted that in *Skelly* the Court of Appeals had made it clear that the refund power did not depend upon the presence of express refund conditions but upon equitable considerations. Since the hearings before the Commission in *Amerada* had taken place prior to the decision on appeal in *Skelly*, the Commission deferred decision of the refund question in *Amerada*, so that the parties might submit further briefs. See 31 F. P. C., at 638–639. After full briefing of the refund issue, the Commission ordered the *Amerada* producers to refund all sums collected under the temporary certificates in excess of the in-line rate, with the exception of amounts expended for royalties and production taxes prior to the date of the decision on appeal in *Skelly* and in reasonable reliance upon the Commission's orders. 36 F. P. C. 309.

On appeal of the Commission's *Amerada* order setting the in-line price and deferring the refund question, the Court of Appeals for the Tenth Circuit noted the issuance of the subsequent Commission order compelling refunds and held that the refund issue was ripe for judicial review. Relying in part upon its earlier decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 270 F. 2d 404, the Tenth Circuit held that the Commission lacked power to order refunds of amounts collected under

unconditioned temporary certificates. 370 F. 2d 181. It reasoned that to permit such refunds would undermine producer confidence and destroy stability. When the Commission's refund orders were themselves appealed, the Tenth Circuit reaffirmed its position in a *per curiam* opinion. 376 F. 2d 578.

B.

We consider that in so holding the Tenth Circuit erred. The producers' initial contention in support of the opinion below is that temporary certificates are appealable orders, and that under § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b), review must be sought within 60 days of the issuance of the certificate and not, as here, at the time of application for a permanent certificate. We find this argument unpersuasive. Temporary certificates normally are issued *ex parte,* upon receipt of an application from a producer in the form of a letter.[30] This procedure is authorized by a proviso to § 7 (c) of the Act, quoted *supra,* at 26, which permits the Commission to issue temporary certificates without any notice to potentially interested persons.[31] Hence, no one but the producer recipient may be aware of the issuance of a temporary certificate within the appeal period.

Moreover, to hold that a temporary certificate must be challenged immediately or not at all, as the producers suggest, might encourage appeals which would impair the usefulness of temporary certificates. Temporary certificates are intended to permit immediate delivery of gas in emergencies. To delay the issuance of the certificate and the flow of the gas until the completion of judicial review which might consume months or years would

[30] See, *e. g.,* 1 Joint Appendix 78–81; 18 CFR § 157.17.

[31] Counsel for the Commission stated on oral argument that in the early 1960's the Commission, on its own initiative, did begin to make information about issuance of temporary certificates available to the public at its office.

severely hamper the performance of this function. We therefore hold that parties, at least those other than the producer itself,[32] may challenge a temporary certificate at the time a permanent certificate is applied for.

The producers' second argument is that a temporary certificate is a "final" order creating vested rights, and that it may be altered only prospectively. This contention is related to the last, and has much the same flaw. To encourage early attack on temporary certificates would diminish their utility. Yet to discourage prompt challenges and simultaneously to hold that refunds could not be ordered for the interim period would in large part frustrate the objectives of the Natural Gas Act by allowing producers to operate for long intervals [33] on the basis of their own representations and with only minimal regulation by the Commission.

The producers' third contention, which coincides with the rationale of the Tenth Circuit below and in its previous decision in *Sunray Mid-Continent, supra,* is that temporary certificates must be retroactively unmodifiable in order that producers may be assured of a firm price at which to operate. We cannot accept this reasoning. When a producer has requested permission to begin delivery of gas prior to completion of normal certification procedures, due to an emergency, we think it not unfair that in return for that permission it accept the risk that at the termination of those procedures the terms proposed by it may be retrospectively altered to conform to the public interest.

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[32] The Court of Appeals for the Fifth Circuit has held that the producer itself must challenge the certificate within 60 days after it is issued. *Texaco, Inc.* v. *Federal Power Comm'n,* 290 F. 2d 149. There is no occasion for us to pass on the correctness of that decision.

[33] Some of the producers involved in the *Amerada* proceeding delivered gas under temporary certificates for more than 2½ years. *E. g.,* compare 1 Joint Appendix 71 with *id.,* at 166.

We are strengthened in that view by this Court's decision in *Callery, supra.* The Court there held that when a permanent certificate, containing no refund condition, is held on judicial review to have embodied too high an in-line price, the Commission may on remand condition the new permanent certificate to require refund of the excessive charges received under the old. If the producer expectations created by a permanent certificate may thus be overridden by the public interest, then the surely lesser reliance induced by an "unconditioned" temporary certificate issued on the producer's own representations should not bar a later refund requirement. For all of these reasons, we hold that in the exercise of its power to condition permanent certificates under § 7 (e), the Commission may require producers to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price.[34]

C.

It remains to be considered whether the Commission was precluded from exercising its refund power in the particular circumstances of the *Amerada* proceeding.[35] The background and nature of the *Amerada* refund

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[34] No party has contended that the refunds should have been based on the eventual just and reasonable rate, and we think it clear that the Commission did not exceed its authority in founding them on the in-line price. See *supra,* at 22–23; *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U. S. 223, 230.

[35] Because the Court of Appeals held that the Commission lacked power to require refunds, it did not pass on the producers' contentions that the refunds actually ordered were inequitable. Those contentions were presented to this Court in the producers' reply brief. Although we normally do not review orders of administrative agencies in the first instance, see, *e. g., Federal Power Comm'n* v. *United Gas Pipe Line Co.,* 386 U. S. 237, 247, we consider it appropriate in this instance to resolve this question without remand to the court below for initial consideration, in order that this extended

orders have already been described. We conclude that neither the procedure followed nor the result reached by the Commission in imposing the *Amerada* refunds amounted to an abuse of discretion.

The producers assert that they were entitled to an irrevocable assurance of price in order that they might rationally decide whether to dedicate their gas to interstate commerce, and so that they might plan their budgets during the lives of the temporary certificates. However, we believe that such generally worded arguments are foreclosed by our decision upholding the Commission's refund power, for in the course of that decision we rejected the producers' claim that they were legally entitled to an assurance of a firm price at which to operate. See *supra*, at 30–31.

The producers further contend that the Commission's repeated indications that it would not order refunds, see *supra*, at 27–28, made the ordering of refunds inequitable in this instance, in that the Commission's pronouncements caused the producers to place unusual reliance upon the prices authorized by the temporary certificates. However, this kind of reliance is precisely what the Commission gave the producers an opportunity to prove on re-briefing. We cannot say that the Commission exceeded its discretion in finding that the producers did not show such reliance as to deprive the Commission entirely of refund power in this case. We note further that the Commission did give consideration to individual pleas for relief from the refund obligation, due to alleged hardship,[36] and that in other proceedings the Commission has

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proceeding may at last come to an end. Compare, *e. g.*, *Permian Basin Area Rate Cases*, — U. S., at —, n. 114; *Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 326, 355–356.

[36] See 36 F. P. C. 962 (memorandum opinion and order confirming *Amerada* order requiring refunds).

granted such relief.[37] Therefore, although it is regrettable that the road which led to these refund requirements could not have been straighter,[38] we hold that the Commission did not exceed its authority.

III.

The third and last major issue is whether the Commission erred in failing to make a reasoned finding that there was a public need for the gas certificated in the District 2 and District 3 (*Sinclair* and *Hawkins*) proceedings. In those proceedings, the New York Public Service Commission asserted that there was no public need for the gas, alleging in particular that several of the purchasing pipelines were already obligated under "take-or-pay" provisions of existing contracts either to take more gas than they could foreseeably use or to pay for it.[39]

In both proceedings, the Commission refused to give more than perfunctory consideration to the issue of "need." Its stated justification was that the need question should be dealt with in pipeline rather than producer proceedings. The Court of Appeals for the District of Columbia Circuit held that the Commission erred in declining to come to grips with the need issue in the course of producer certification. — U. S. App. D. C. —, 373 F. 2d 816. That court held that the Commission should have

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[37] See *Turnbull & Zoch Drilling Co.*, 36 F. P. C. 164, 166–167.

[38] Cf. 1 Joint Appendix 159–162 (unreported opinions of Commissioners Morgan and Ross concurring in the Commission's Feb 5, 1963, denial of prospective refund conditions in *Amerada*).

[39] A contractual "take-or-pay" provision obligates a pipeline, over a stated period, to take an average amount of gas or to pay for it. A "make-up" period is also specified, during which the pipeline may take the gas previously paid for without further payments. The "prepayments" for gas not yet taken usually are capitalized and included in the pipeline's rate base.

directed itself not only to the take-or-pay positions of the purchasing pipelines but to the question whether those pipelines proposed to sell the gas to customers who would use it in an "economically 'inferior' way."

The Commission regulates pipelines in a number of different ways. When a pipeline must expand its facilities significantly in order to take on new supplies of gas, it is required by § 7(c) of the Natural Gas Act, 15 U. S. C. § 717f(c), to obtain a certificate of public convenience and necessity, which may be issued only after notice and hearing. In these certification proceedings, the Commission considers many matters, including the needs of the pipeline's customers and its gas supply.[40] The Commission also grants pipelines so-called "budget" authority to spend limited amounts on gas-purchasing facilities on an annual basis, without further Commission approval.[41] This authority is granted only after notice and opportunity for objection.[42] In addition, the Commission requires periodic reports from all pipelines,[43] and collects and publishes material on the supply of gas, including data on the pipelines' take-or-pay positions.[44]

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[40] See, *e. g.*, *Transwestern Pipeline Co.*, 36 F. P. C. 176, 191–199; *Transcontinental Gas Pipeline Corp.*, F. P. C. Docket No. CP 65–181 (Phase II), Opinion No. 532, Nov. 6, 1967. See also *Federal Power Comm'n* v. *Transcontinental Gas Pipeline Corp.*, 365 U. S. 1.

[41] At present, "budget" authority permits a pipeline to expend on gas-purchasing facilities the lesser of $5,000,000 or 1.5% of its existing plant investment, with the total cost of any single gas-purchase project not to exceed the lesser of $500,000 or 25% of the total budget amount. See 18 CFR § 157.7 (b).

[42] See *id.*, § 157.9 *et seq.* Annual reports must be made to the Commission describing the prior year's construction. *Id.*, § 157.7 (b)(3).

[43] See *id.*, § 260.7.

[44] See Federal Power Commission, Annual Reports, 1963–1967; Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1963 and 1964 (February

We think that the Commission did not abuse its discretion in deciding that the need issue, in both its take-or-pay and end-use [45] aspects, can be better dealt with in these pipelines proceedings than in producer proceedings. In the first place, the requisite information is more readily available in pipeline proceedings. To resolve the take-or-pay issue, it is necessary to have information about the total gas supply of the purchasing pipeline, its outstanding sales contracts, and its take-or-pay situation under those contracts. These data normally will be in the possession of the pipeline, but not of the producer. Decision of the end-use question must be based on information not only about the customers of the purchasing pipeline but about the alternative uses to which the gas might be put by other pipelines which might buy it. This information will be known collectively by a number of pipelines; an individual producer cannot even know what customer of the purchasing pipeline will receive the gas he supplies.[46] Although it might be possible for the Commission to require the relevant pipeline or pipelines to furnish all this information in each producer certification proceeding,[47] that procedure would be cumbersome and would

1966); Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1964 and 1965" (August 1967).

[45] The producers assert that the end-use aspect of the need issue is not properly before us because the New York Public Service Commission failed to raise the issue in its petition for rehearing before the Commission, as required by § 19 (b) of the Natural Gas Act, 15 U. S. C. § 717r (b). Since the Court of Appeals did rule on the end-use question, and since we hold in favor of the producers on all parts of the need issue, we think it appropriate to reach the question without passing upon the producers' procedural claim.

[46] See *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366, 369–370; *Mississippi River Fuel Corp.* v. *Federal Power Comm'n*, 252 F. 2d 619, 623–625.

[47] The Commission elsewhere has conceded that the administrative burden of such a procedure would not be unbearable. See Memo-

lengthen the producer proceedings, which we have previously commended the Commission for endeavoring to shorten.[48]

In the second place, there is reason to believe that the pipeline proceedings, supplemented by other forms of regulation available to the Commission, will provide an adequate forum in which to confront both aspects of the need issue. Turning first to the take-or-pay question, we note that the Commission has evinced a continuing concern about it. The current adverse take-or-pay positions of some pipelines, stressed by the seaboard interests in these proceedings, apparently were due in some part to a pre-1964 Commission requirement that each pipeline maintain a twelve-year supply of gas, in order to assure adequate reserves. In 1964 this requirement was made more flexible.[49] The Commission in 1965 ordered pipelines to submit more detailed reports on their contractual take-or-pay provisions.[50] And in 1967, at the termination of a rule-making proceeding begun in 1961, the Commission prescribed by rule that contractual take-or-pay provisions must allow the purchasing pipeline at least five years in which to take gas previously paid for without making additional payments.[51]

Thus, the Commission itself has taken steps to alleviate take-or-pay problems. Persons who want the Commission to take additional action have adequate opportunity to present their views during the Commission's rule-

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randum for the Federal Power Comm'n in *Austral Oil Co.* v. *Federal Power Comm'n*, No. 504, 1967 Term, at 5–6.

[48] See *Federal Power Comm'n* v. *Hunt*, 376 U. S. 515, 527; *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 227, 228, n. 3.

[49] See Order No. 279, 31 F. P. C. 750.

[50] See Order No. 301, 34 F. P. C. 76.

[51] See Order No. 334, 37 F. P. C. 110.

making [52] or pipeline proceedings. If a pipeline must build substantial new facilities to handle the gas in question, then interested persons may express their objections in the certification proceeding.[53] Those who believe that a pipeline which seeks "budget" authority is in such a take-or-pay position that it should not be allowed to acquire new gas may ask that the authority be denied or conditioned. Although some gas may be taken by pipelines through existing facilities, without even "budget" authority,[54] these opportunities for a hearing seem sufficient to protect the public interest.

The Commission has undertaken to assure that gas is not devoted to wasteful end uses, and this Court has upheld its exercise of such authority. See *Federal Power Comm'n* v. *Transcontinental Gas Pipeline Corp.*, 365 U. S. 1. The Commission has dealt with this question primarily in pipeline certification proceedings.[55] This does not seem inappropriate, since any new use of significant amounts of gas will normally entail the erection of substantial new pipeline facilities, requiring certification. Persons who anticipate that a pipeline which is seeking "budget" authority will devote the gas to inferior end uses may request that the authority be withheld or limited. We believe that these opportunities for objection are adequate to protect the public interest in conservation of gas.

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[52] See 18 CFR § 1.3 (notice requirement for substantive rulemaking proceedings).

[53] The seaboard interests apparently achieved considerable success in a pipeline certification proceeding which grew out of the *Sinclair* proceeding now under review. See *Lone Star Gas Co.*, 36 F. P. C. 497; *Lone Star Gas Co.*, F. P. C. Docket No. CP 65–118, Order Vacating Certificates, Sept. 15, 1967.

[54] Counsel for the Commission estimated on oral argument that 25% of the gas involved in the *Sinclair* and *Hawkins* proceedings could be attached at existing facilities.

[55] See *supra*, at 34 and n. 40.

Of course, our approval of the Commission's decision to deal with the need question in pipeline proceedings does not imply that the Commission may neglect its statutory duty to assure that sales of gas are required by the public "necessity." [56] This statutory obligation implies that when interested parties assert that the Commission has permitted or is about to permit the sale of significant quantities of unneeded gas, then the Commission must supply an adequate forum in which to hear their contentions. We hold only that, so far as appears from the record before us, pipeline proceedings can serve as such a forum. If subsequent events should demonstrate that existing pipeline proceedings are inadequate, then the Commission must provide new arenas for objection.

For the foregoing reasons, we affirm the decision of the Court of Appeals for the Tenth Circuit and reverse that of the Court of Appeals for the District of Columbia Circuit on the in-line price issue. We reverse the decision of the Tenth Circuit on the question of refunds and that of the District of Columbia Circuit on the matter of need.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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[56] The Commission has attempted to fulfill this duty by regulating both the take-or-pay and end-use aspects of the need question. See *supra*, at 34, 36, 37.